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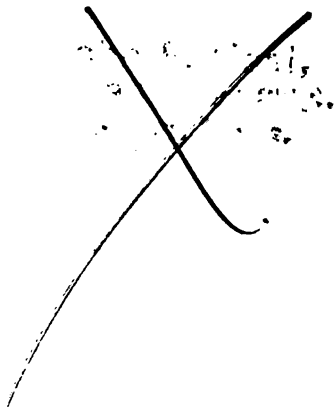

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MASSACHUSETTS REPORTS

134

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1883 — APRIL 1883

JOHN LATHROP

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1884

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. CHARLES DEVENS.
HON. WILLIAM ALLEN.
HON. CHARLES ALLEN.
HON. WALDO COLBURN.
HON. OLIVER W. HOLMES, JR.
(Appointed, December 15, 1882.)

ATTORNEYS GENERAL.

HON. GEORGE MARSTON.
HON. EDGAR J. SHERMAN.

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TABLE

OF THE CASES REPORTED.

Aldrich *v.* Blake 582
Allen *v.* Butman 347
——— *v.* Leominster Savings Bank 580
——— (Mutual Life Ins. Co. *v.*) 389
——— (Petty *v.*) 265
——— *v.* Wright 347
Alley *v.* Winn 77
Amherst College *v.* Smith . . 543
Amstein *v.* Gardner 4
Aston *v.* Newton 507
Atlantic & Pacific Railroad (Ellis *v.*) 338

Barnacle (Commonwealth *v.*) . 215
Bates *v.* Bates 110
——— *v.* Emery 186
Belcher *v.* Whittemore . . . 330
Benjamin *v.* Dockham . . . 418
Beverly (Crowell *v.*) . . . 98
Bibber (Percy *v.*) 404
Bigaouette *v.* Paulet 123
Blaisdell (Legallee *v.*) . . . 473
Blake (Aldrich *v.*) 582
Boston (McDougall *v.*) . . . 149
Boston & Lowell Railroad (Commonwealth *v.*) . . . 211
Boston Heel & Leather Co. (Pratt *v.*) 300
Boston Water Power Co. (Williams *v.*) 406
Boyce (Swett *v.*) 381
Brailey (Commonwealth *v.*) . 527
Brayman *v.* Whitcomb . . . 525
Bridgewater Iron Co. *v.* Enterprise Ins. Co. 433
Brodie (Loring *v.*) 453
Brookline (Tileston *v.*) . . . 438
Brooks (Jewett *v.*) 505
Brown *v.* Corey 249
——— *v.* Eastern Slate Co. . 590
Bryant (Wilson *v.*) 291
Butman (Allen *v.*) 347
Buxton *v.* Edwards . . . 567
Byington *v.* Simpson . . . 145
——— *v.* ——— 169

Cambridge (McCabe *v.*) . . 484
Casey (Commonwealth *v.*) . 194
Chapin (Langley *v.*) . . . 82
——— (White *v.*) 230
Chase (Murray *v.*) 92
Colby (Wilder *v.*) 377
Cole *v.* Groves 471
Collier (Commonwealth *v.*) . 203
Commonwealth *v.* Barnacle . 215
——— *v.* Boston & Lowell Railroad 211
——— *v.* Brailey 527
——— *v.* Casey 194
——— *v.* Collier 203
——— *v.* Fenno 217
——— *v.* Gibbons 197
——— *v.* Harriman 314
——— *v.* Ismahl 201
——— *v.* Mahoney 220
——— *v.* Morrison 189
——— *v.* Mosher 226
——— *v.* Nichols 531
——— *v.* O'Brien 198
——— *v.* Palmer 537
——— *v.* Ryan 228
——— *v.* Shaw 221
——— *v.* Thyng 191
——— *v.* Whelan 206

Digitized by Google

Connell (Hogle *v.*) 150
Conners *v.* Loker 510
Corey (Brown *v.*) 249
Costelo *v.* Crowell 280
Cottage City *v.* Edgartown . 67
Couch (Weber *v.*) 26
Crane (Penn Ins. Co. *v.*) . . 56
Crosby (Lynch *v.*) 313
Crowell *v.* Beverly 98
——— (Costelo *v.*) 280
Cushing (Fisher *v.*) 374

Davis *v.* Mailey 588
——— (Pickens *v.*) . . . 252
——— (Savage *v.*) 401
Devlin (Newton *v.*) 490
Dexter *v.* Episcopal City Mission 394
Dockham (Benjamin *v.*) . . 418
Dodge (Hanson *v.*) 273
Doe *v.* Erwin 90
Dows *v.* Swett 140
Dunn (Johnson *v.*) 522
——— (White *v.*) 271

Eastern Slate Co. (Brown *v.*) 590
Eaton (Philbrook *v.*) . . . 398
Edgartown (Cottage City *v.*) . 67
Edwards (Buxton *v.*) . . . 567
Ellis *v.* Atlantic & Pacific Railroad 338
Emery (Bates *v.*) 186
Enterprise Ins. Co. (Bridgewater Iron Co. *v.*) . . . 433
Episcopal City Mission (Dexter *v.*) 394
Erwin (Doe *v.*) 90
Estabrook (McIver *v.*) . . . 550

Fall River (Watuppa Reservoir Co. *v.*) 267
Farnsworth *v.* Lowery . . . 512
Fels *v.* Raymond 376
Fenno (Commonwealth *v.*) . 217
Finnegan (Thayer *v.*) . . . 62
Fisher *v.* Cushing 374
Fitchburg Railroad *v.* New Haven & Northampton Co. 547
——— (Tully *v.*) 499
Fitchburg Savings Bank *v.* Torrey 239
Flanders (Holmes *v.*) . . . 147
Fleck *v.* Union Railway . . 480
Floyd *v.* Sugden 563
Flynn *v.* Salem 351
Foster *v.* Foster 120
French *v.* Star Union Transportation Co. 288
Frissell (Wolcott *v.*) 1

Gardner (Amstein *v.*) . . . 4
——— (Rathke *v.*) 14
Gibbons (Commonwealth *v.*) . 197
Gleason *v.* McKay 419
Granger (Phillips *v.*) . . . 475
Grant *v.* Mellen 335
Griswold (Stewart *v.*) . . . 391
Groves (Cole *v.*) 471
Guernsey *v.* Wilson 482

Hale *v.* Joslin 310
Haley *v.* Young 364
Hall (Shaw *v.*) 103
Hanson *v.* Dodge 273
Harriman (Commonwealth *v.*) 314
Hathaway (New Bedford Institution for Savings *v.*) . . 69
Haverhill Aqueduct Co. (Marsh *v.*) 106
Hedden *v.* Roberts 38
Hemenway *v.* Hemenway . . 446
Henderson (Riley *v.*) . . . 171
Hill (Stratton *v.*) 27
Hogle *v.* Connell 150
Holden *v.* Hoyt 181
——— *v.* Upton 177
Holmes *v.* Flanders 147
Hoyt (Holden *v.*) 181
Hubbard (Porter *v.*) . . . 233

Ide *v.* Pierce 260
Irwin (Teague *v.*) 303
Ismahl (Commonwealth *v.*) . 201

Jaquith (Marshall *v.*) . . . 138
Jenkins *v.* Wood 115
Jewett *v.* Brooks 505
Johnson *v.* Dunn 522
Joslin (Hale *v.*) 310

Kennedy *v.* Owen 227
Kimball *v.* McIntosh . . . 362
Knapp *v.* Knapp 353

Digitized by Google

Lamb (Sohier *v.*) 275
Lamson (Payson *v.*) 593
Langley *v.* Chapin 82
Lawrence (Taber *v.*) . . . 94
Legallee *v.* Blaisdell 473
Lemon *v.* Newton 476
Leominster Savings Bank (Allen *v.*) 580
Leyland *v.* Pingree 367
Loker (Conners *v.*) 510
Loring *v.* Brodie 453
Lowe *v.* Moore 259
Lowery (Farnsworth *v.*) . . 512
Lynch *v.* Crosby 313

McCabe *v.* Cambridge . . . 484
McCarty (Sloan *v.*) 245
McDougall *v.* Boston . . . 149
McIntosh (Kimball *v.*) . . . 362
McIver *v.* Estabrook . . . 550
McKay (Gleason *v.*) . . . 419
McKim *v.* Williams 136
Mahoney (Commonwealth *v.*) 220
Mailey (Davis *v.*) 588
Manchaug Manuf. Co. (St. Andrew *v.*) 42
Manning (Murphy *v.*) . . . 488
Mansfield *v.* Shepard . . . 520
Marsh *v.* Haverhill Aqueduct Co. 106
Marshall *v.* Jaquith 138
Matthews *v.* Westborough . . 555
May *v.* Ward 127
Mechanics' National Bank *v.* Robins 331
Mellen (Grant *v.*) 335
Merrimack River Navigation & Express Co. (Wallace *v.*) 95
Moore (Lowe *v.*) 259
——— (Orcutt *v.*) 48
——— (Smith *v.*) 405
Moors (Norway Plains Savings Bank *v.*) 129
——— *v.* Street Commissioners 431
——— (Thacher *v.*) . . . 156
Morrill *v.* Wiseman . . . 252, *n.*
Morrison (Commonwealth *v.*) 189
Mosher (Commonwealth *v.*) . 226
Munroe (Sias *v.*) 153
Murphy *v.* Manning 488
Murray *v.* Chase 92
Mutual Life Ins. Co. *v.* Allen 389

Naumkeag Steam Cotton Co. (Woods *v.*) 357
New Bedford Institution for Savings *v.* Hathaway . . . 69
New Haven & Northampton Co. (Fitchburg Railroad *v.*) 547
Newton (Aston *v.*) 507
——— *v.* Devlin 490
——— (Lemon *v.*) 476
——— (Sanger *v.*) 308
New York Mutual Life Ins. Co. *v.* Allen 389
New York & New England Railroad *v.* Sanders . . . 53
Nichols (Commonwealth *v.*) . 531
Norway Plains Savings Bank *v.* Moors 129

O'Brien (Commonwealth *v.*) . 198
Orcutt *v.* Moore 48
Owen (Kennedy *v.*) 227

Palmer (Commonwealth *v.*) . 537
Parsons *v.* Phelan 109
Paulet (Bigaouette *v.*) . . . 123
Payson *v.* Lamson 593
Penn Ins. Co. *v.* Crane . . 56
Percy *v.* Bibber 404
Perkins *v.* Perkins 441
Petty *v.* Allen 265
Phelan (Parsons *v.*) . . . 109
Phelps *v.* Webster 17
Philbrook *v.* Eaton 398
Phillips *v.* Granger 475
Pickens *v.* Davis 252
Pierce (Ide *v.*) 260
Pingree (Leyland *v.*) . . . 367
Plimpton (Winslow *v.*) . . 44
Porter *v.* Hubbard 233
Powers (Ray *v.*) 22
Pratt *v.* Boston Heel & Leather Co 300
Preston (Sturgis *v.*) 372
Proctor *v.* Whitcomb . . . 428

Rathke *v.* Gardner 14
Ray *v.* Powers 22
Raymond (Fels *v.*) 376
Riley *v.* Henderson 171
Roberts (Hedden *v.*) . . . 38
Robins (Mechanics' National Bank *v.*) 331

Digitized by Google

Rogers v. Union Stone Co. . 31
Ross v. Wilcox 21
Ryan (Commonwealth v.) . . 223

St. Andrew v. Manchaug Manuf. Co. 42
Salem (Flynn v.) 351
Sanders (New York & New England Railroad v.). . . 53
Sanger v. Newton 308
Savage v. Davis 401
Schouler, petitioner 426
Shapleigh v. Wyman . . . 118
Shaw (Commonwealth v.) . . 221
——— v. Hall 103
Shepard (Mansfield v.) . . . 520
Sias v. Munroe 153
Simpson (Byington v.) . . . 145
——— (Byington v.) . . . 169
Sloan v. McCarty 245
Smith (Amherst College v.) . 543
——— v. Moore 405
——— v. Wells 11
Sohier v. Lamb 275
Springfield Institution for Savings (White v.) 232
Star Union Transportation Co. (French v.) 288
Stewart v. Griswold 391
Stratton v. Hill 27
Street Commissioners (Moors v.) 431
Studley v. Willis 155
Sturgis v. Preston 372
Sugden (Floyd v.) 563
Swett v. Boyce 381
——— (Dows v.) 140

Taber v. Lawrence 94
Teague v. Irwin 303
Thacher v. Moors 156
Thayer v. Finnegan 62
Thyng (Commonwealth v.) . 191
Tileston v. Brookline . . . 438
Torrey (Fitchburg Savings Bank v.) 239
Travellers' Ins. Co. (Tuttle v.) 175
Tully v. Fitchburg Railroad . 499
Tuttle v. Travellers' Ins. Co. . 175

Union Railway (Fleck v.) . . 480
Union Stone Co. (Rogers v.) . 31
Upton (Holden v.) 177

Wallace v. Merrimack River Navigation & Express Co. . 95
Ward (May v.) 127
Warren v. Warren Thread Co. 247
Warren Thread Co. (Warren v.) 247
Watuppa Reservoir Co. v. Fall River 267
Weber v. Couch 26
Webster (Phelps v.) . . . 17
Wells (Smith v.) 11
Westborough (Matthews v.) . 555
Whelan (Commonwealth v.) . 206
Whitcomb (Brayman v.) . . 525
——— (Proctor v.) 428
White v. Chapin 230
——— v. Dunn 271
——— v. Springfield Institution for Savings 232
Whittemore (Belcher v.) . . 330
Whitwell v. Winslow . . . 343
Wilcox (Ross v.) 21
Wilder v. Colby 377
Williams v. Boston Water Power Co. 406
——— (McKim v.) . . . 136
Willis (Studley v.) 155
Wilson v. Bryant 291
——— (Guernsey v.) . . . 482
Winn (Alley v.) 77
Winslow v. Plimpton . . . 44
——— (Whitwell v.) . . . 343
Wiseman (Morrill v.) . . 252, n.
Wolcott v. Frissell 1
Wood (Jenkins v.) 115
Woods v. Naumkeag Steam Cotton Co. 357
Wright (Allen v.) 347
Wyman (Shapleigh v.) . . . 118

Young (Haley v.) 364

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TABLE OF CASES

CITED BY THE COURT.

Adams *v.* Brackett, 5 Met. 280 64, 139
——— *v.* Drake, 11 Cush. 504 71
——— *v.* Ipswich, 116 Mass. 570 373
Albro *v.* Agawam Canal, 6 Cush. 75 566
Alderman *v.* Phelps, 15 Mass. 225 366
Aldrich *v.* Ames, 9 Gray, 76 30
Alger *v.* Scoville, 1 Gray, 391 30
Allen *v.* Allen, 100 Mass. 373 355
——— *v.* Furbish, 4 Gray, 504 334
——— *v.* Woodard, 125 Mass. 400 297
Allyn *v.* Boston & Albany Railroad, 105 Mass. 77 176, 500
Ames *v.* Foster, 106 Mass. 400 29
Amherst Bank *v.* Root, 2 Met. 522 184
Amos *v.* Oakley, 131 Mass. 413 506
Andrews *v.* Sparhawk, 13 Pick. 393 546
Anthony *v.* Adams, 1 Met. 284 480
——— *v.* Valentine, 130 Mass. 119 599
Apperson *v.* Wilbourn, 58 Miss. 439 76
Arundel *v.* M'Culloch, 10 Mass. 70 524
Attorney General *v.* Andrew, 3 Ves. 633 428
Atwater *v.* Clancy, 107 Mass. 369 307, 404
Atwood *v.* Vincent, 17 Conn. 575 66
Austin *v.* Moore, 7 Met. 116 187
Ayer *v.* Tilden, 15 Gray, 178 592

Babcock *v.* Western Railroad, 9 Met. 553 16
Bacon *v.* Charlton, 7 Cush. 581 218
——— *v.* Woodward, 12 Gray, 376 589
Bahia & San Francisco Railway, In re, L. R. 3 Q. B 584 184
Bailey *v.* Glover, 21 Wall. 342 22
——— *v.* Woburn, 126 Mass. 416 269
Baker *v.* Briggs, 8 Pick. 122 244, 297
Baldwin *v.* Hale, 1 Wall. 223 489
Bancroft *v.* Boston & Worcester Railroad, 11 Allen, 34 504
——— *v.* Consen, 13 Allen, 50 180
Bank *v.* Donaldson, 6 Penn. St. 179 65
——— *v.* Lanier, 11 Wall. 369 242
Bard *v.* Wood, 8 Met. 74 122
Barksdale *v.* Hopkins, 23 Ga. 332 255
Barnicoat *v.* Folling, 3 Gray, 134 472
Bates *v.* Smith, 100 Mass. 181 15
Baxter *v.* McIntire, 13 Gray, 168 596
Baxter *v.* Troy & Boston Railroad, 41 N. Y. 502 176
Bearce *v.* Bowker, 115 Mass. 129 167
Beardsley *v.* Torrey, 4 Wash. C. C. 286 390
Bee Printing Co. *v.* Hichborn, 4 Allen, 63 40
Behan *v.* Williams, 128 Mass. 366 190
Bell *v.* Ingestre, 12 Q. B. 317 62, 335
Belshaw *v.* Bush, 11 C. B. 191 142
Bemis *v.* Leonard, 118 Mass. 502 392
Benton *v.* Martin, 52 N. Y. 570 62
Betts *v.* Bagley, 12 Pick. 572 489
Bevan *v.* Cooper, 72 N. Y. 317 65
Biffin *v.* Bignell, 7 H. & N. 877 80
Birdsall *v.* Hewlett, 1 Paige, 32 546
Bishop *v.* Bishop, 9 W. R. 549 451
——— *v.* Little, 3 Greenl. 405 373
Blake *v.* McKim, 103 U. S. 336 390
Blanchard *v.* Allen, 116 Mass. 447 91
Bohanon *v.* Walcot, 1 How. (Miss.) 336 255
Bostock *v.* Blakeney, 2 Bro. C. C. 653 453
Boston *v.* Richardson, 13 Allen, 146 18
Boston Water Power Co. *v.* Boston, 127 Mass. 374 414
Boudinot *v.* Bradford, 2 Yeates, 170 255
——— *v.* ——— 2 Dall. 266 255
Bowditch *v.* Green, 8 Met. 360 72
Bowker *v.* Hoyt, 18 Pick. 555 40
Bowler *v.* Palmer, 2 Gray, 553 340
Bowser *v.* Wellington, 126 Mass. 391 119
Boyce *v.* Grundy, 3 Pet. 210 185
Boyces, In re, I. R. 1 Eq. 45 450
Boynton *v.* Warren, 99 Mass. 172 350
Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228 262, 445
Brackett *v.* Winslow, 17 Mass. 153 71
Bragner *v.* Langmead, 7 T. R. 20 354
Bree *v.* Holbech, Doug. 630 373
Brewer *v.* Boston, Clinton & Fitchburg Railroad, 113 Mass. 52 549
——— *v.* Franklin Mills, 42 N. H. 292 71
Bridge *v.* Gray, 14 Pick. 55 579
Brimmer *v.* Boston, 102 Mass. 19 479

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Broadway National Bank *v.* Adams, 130 Mass. 431 340
Broderick *v.* Waltham Savings Bank, 109 Mass. 149 262
Bronson *v.* Schulten, 104 U. S. 410 526
Brown *v.* Bridge, 106 Mass. 563 489
——— *v.* Brown, 8 El. & Bl. 876 254
——— *v.* Commonwealth, 8 Mass. 59 535
——— *v.* Corey, 134 Mass. 249 252, *n.*
——— *v.* Gellatly, L. R. 2 Ch. 751 451
——— *v.* Kelsey, 2 Cush. 243 428
——— *v.* Tapscott, 6 M. & W. 119 287
Bruce *v.* Burr, 67 N. Y. 276 142
Bryant *v.* Rich, 106 Mass. 180 340, 390
Buckland *v.* Green, 133 Mass. 421 284
Buckman *v.* Goddard, 21 Pick. 70 29
Bulkeley *v.* Stephens, 10 L. T. (N. S.) 225 452
——— *v.* ——— 3 N. R. 105 453
Bull *v.* Sibbs, 8 T. R. 327 418
Burke *v.* Savage, 13 Allen, 408 94
Butler *v.* Fessenden, 12 Cush. 78 392
Butts *v.* Dean, 2 Met. 76 141

Cabot Bank *v.* Bodman, 11 Gray, 134 296
Cady *v.* Shepherd, 11 Pick. 400 579
Cahill *v.* Bigelow, 18 Pick. 369 30
Calder *v.* Dobell, L. R. 6 C. P. 486 171
Capen *v.* Barrows, 1 Gray, 376 286
Cardell *v.* McNiel, 21 N. Y. 336 142
Carey *v.* Berkshire Railroad, 1 Cush. 475 213
Carne *v.* Long, 8 W. R. 570 114
Carpenter *v.* Farnsworth, 106 Mass. 561 36
——— *v.* King, 9 Met. 511 244, 489, 593
Carr *v.* Dooley, 119 Mass. 294 30
Cary *v.* Daniels, 5 Met. 236 16
Case *v.* Bank, 100 U. S. 446 180
Casey *v.* Cavaroc, 96 U. S. 467 165
Cave *v.* Cave, 15 Ch. D. 639 458
Cazenove *v.* Cutler, 4 Met. 246 593
Chace *v.* Chapin, 130 Mass. 128 445
Chaffee *v.* Boston & Lowell Railroad, 104 Mass. 108 500
Chamberlin *v.* Shaw, 18 Pick. 278 168
Chambers *v.* Caulfield, 6 East, 244 125
Chandler *v.* Jamaica Pond Aqueduct, 125 Mass. 544 107
Chapin *v.* Lapham, 20 Pick. 467 30
——— *v.* Livermore, 13 Gray, 561 187
Charlestown *v.* County Commissioners, 109 Mass. 270 432
Child *v.* Boston, 4 Allen, 41 479
Choteau *v.* Richardson, 12 Allen, 365 489
Clark *v.* Clark, 108 Mass. 522 262
——— *v.* Iselin, 21 Wall. 360 165
Clarke *v.* Tufts, 5 Pick. 336 545
Cleaves *v.* Lord, 3 Gray, 66 418
Close *v.* Phipps, 7 Man. & G. 586 593
Cluff *v.* Mutual Benefit Ins. Co. 13 Allen, 308 177
——— *v.* ——— 99 Mass. 317 177
Cochran *v.* Goodell, 131 Mass. 464 584
Cockburn *v.* Peel, 3 DeG., F. & J. 170 450
Codman *v.* Evans, 1 Allen, 443 18
Coffin *v.* Loring, 5 Allen, 153 597
Cohen *v.* Waley, 7 Jur. (N. S.) 937 451
Colburn *v.* Richards, 13 Mass. 420 524
Cole *v.* Turner, 4 Russ. 376 64
Collagan *v.* Burns, 57 Maine, 440 258
Collamer *v.* Foster, 26 Vt. 754 287
Collester *v.* Hailey, 6 Gray, 517 91
Colvin *v.* Warford, 20 Md. 357 255
Commonwealth *v.* Abbott, 130 Mass. 472 224
——— *v.* Adams, 127 Mass. 15 202
——— *v.* Andrews, 132 Mass. 263 535
——— *v.* Baldwin, 129 Mass. 481 221
——— *v.* Boston & Albany Railroad, 121 Mass. 36 213
——— *v.* Boston & Maine Railroad, 133 Mass. 383 586
——— *v.* Cary Improvement Co. 98 Mass. 19 425
——— *v.* Casey, 12 Allen, 214 340
——— *v.* Davenport, 2 Allen, 299 202
——— *v.* Dillane, 11 Gray, 67 221
——— *v.* Eastern Railroad, 5 Gray, 473 213
——— *v.* Edds, 14 Gray, 406 203
——— *v.* Fay, 126 Mass. 235 226
——— *v.* Fitchburg Railroad, 120 Mass. 372 536
——— *v.* Galavan, 9 Allen, 271 580
——— *v.* Gill, 14 Gray, 400 233
——— *v.* Hamilton Manuf. Co. 12 Allen, 298 424
——— *v.* Harvey, 1 Gray, 487 580
——— *v.* Hawkins, 3 Gray, 463 535
——— *v.* Hilliard, 2 Gray, 294 216
——— *v.* Howe, 13 Gray, 26 535
——— *v.* Kenney, 12 Met. 235 580
——— *v.* Kimball, 7 Gray, 328 202
——— *v.* Knapp, 9 Pick. 495 503
——— *v.* Mead, 12 Gray, 167 216
——— *v.* Mehan, 11 Gray, 321 233
——— *v.* Nickerson, 5 Allen, 518 536
——— *v.* O'Brien, 12 Cush. 84 535
——— *v.* O'Connell, 12 Allen, 451 202
——— *v.* O'Malley, 131 Mass. 423 215
——— *v.* People's Five Cents Savings Bank, 5 Allen, 428 425
——— *v.* Reading Savings Bank, 133 Mass. 16 179
——— *v.* Squire, 1 Met. 258 529
——— *v.* Slate, 11 Gray, 60 202
——— *v.* Sturtivant, 117 Mass. 122 200
——— *v.* Tobin, 125 Mass. 203 190
——— *v.* Webster, 5 Cush. 295 503
——— *v.* Wellington, 7 Allen, 299 529
——— *v.* Woodward, 102 Mass. 155 215
——— *v.* York, 7 Law Reporter, 497 216
Connecticut Ins. Co. *v.* Commonwealth, 133 Mass. 161 425
Cook *v.* Satterlee, 6 Cow. 108 247
Cooley *v.* Cook, 125 Mass. 406 367
Coolidge *v.* Brigham, 1 Met. 547 29

Digitized by Google

Corbin *v.* Van Brunt, 105 U. S. 576 390
Cordell *v.* New York Central & Hudson River Railroad, 75 N. Y. 330 176
——— *v.* ——— 70 N. Y. 119 176
——— *v.* ——— 64 N. Y. 535 176
Cornell *v.* Dean, 105 Mass. 435 51
Corwine *v.* Corwine, 9 C. E. Green, 579 64, 546
Costelo *v.* Crowell, 127 Mass. 293 285
Counter *v.* Couch, 8 Allen, 436 96
Crafts *v.* Crafts, 13 Gray, 360 596
Crippe *v.* Hartnoll, 4 B. & S. 414 30
Crocker *v.* Gilbert, 9 Cush. 131 297
Crompton *v.* Pratt, 105 Mass. 255 387
Crowley *v.* Commonwealth, 11 Met. 575 536
Cumberland & Oxford Canal *v.* Hitchings, 57 Maine, 146 472
Cunningham *v.* Mahan, 112 Mass. 58 366
Curtis *v.* Eastern Railroad, 14 Allen, 55 16
——— *v.* ——— 98 Mass. 428 16
Cushing *v.* Bedford, 125 Mass. 526 480
——— *v.* Billings, 2 Cush. 158 224
Cushman *v.* Thayer Manuf. Co. 76 N. Y. 365 242
Cutto *v.* Gilbert, 9 Moore P. C. 131 254

Damon *v.* Scituate, 119 Mass. 66 96
Danforth *v.* Penny, 3 Met. 564 350
Daniels *v.* Hudson River Ins. Co. 12 Cush. 416 438
Danvers Savings Bank *v.* Thompson, 130 Mass. 490 340, 390
——— *v.* ——— 133 Mass. 182 390
Darling *v.* Kelly, 113 Mass. 29 51
Davis's appeal, 83 Penn. St. 348 64
Davis *v.* Randall, 115 Mass. 547 334
Dean *v.* Tallman, 105 Mass. 443 30
De Blaquiere *v.* De Blaquiere, 3 Hagg. Eccl. 322 357
Delaney *v.* Root, 99 Mass. 546 50
Dempsey *v.* Gardner, 127 Mass. 381 165
Denniston *v.* Clark, 125 Mass. 216 523
Denny *v.* Eddy, 22 Pick. 533 356
Devoe *v.* Commonwealth, 3 Met. 316 529
Dexter *v.* Booth, 2 Allen, 559 79
Dickinson *v.* Central National Bank, 129 Mass. 279 242
——— *v.* Goodspeed, 8 Cush. 119 238
——— *v.* Swatman, 30 L. J. (N. S.) P. & M. 84 254
Dill *v.* Wareham, 7 Met. 438 373
Dimes *v.* Scott, 4 Russ. 195 451
Doe *v.* Allen, 12 A. & E. 451 258
——— *v.* Pitcher, 6 Taunt. 359 114
Dorr *v.* Fisher, 1 Cush. 271 29
Dover *v.* Gregory, 10 Sim. 393 64
Downman *v.* Rust, 6 Rand. 587 64
Dows *v.* Swett, 120 Mass. 322 30, 143
——— *v.* ——— 127 Mass. 364 143
Drury *v.* Natick, 10 Allen, 169 114
Durour *v.* Motteux, 1 Ves. Sen. 320 114
Dutton *v.* Gerrish, 9 Cush. 89 359
Du Vivier *v.* Hopkins, 116 Mass. 125 340

Earl *v.* Brown, 1 Wils. 302 354
Earle *v.* Bickford, 6 Allen, 549 373
——— *v.* Wood, 8 Cush. 430 113
Eastern Railroad *v.* Benedict, 5 Gray, 561 169
Eastland *v.* Burchell, 3 Q. B. D. 432 80
Eastman *v.* Foster, 8 Met. 19 586
Eddy *v.* O'Hara, 132 Mass. 56 272
Edgerly *v.* Emerson, 3 Foster, 555 71
Edwards *v.* Hale, 9 Allen, 462 238
——— *v.* White Line Transit Co. 104 Mass. 159 290
Elder *v.* Bemis, 2 Met. 599 524
Ellis *v.* Essex Merrimack Bridge, 2 Pick. 243 243
Elton, Ex parte, 3 Ves. 238 74
Emerson *v.* Badger, 101 Mass. 82 248
Emmons *v.* Scudder, 115 Mass. 367 288
Equitable Reversionary Interest Society *v.* Fuller, 1 J. & H. 379 451
Everett *v.* Herrin, 46 Maine, 357 403
Exchange Bank *v.* Rice, 107 Mass. 37 170

Fairbanks *v.* Metcalf, 8 Mass. 230 312
Farmington River Water Power Co. *v.* County Commissioners, 112 Mass. 206 313
Farmington Savings Bank *v.* Fall, 71 Maine, 49 180
Farnam *v.* Brooks, 9 Pick. 212 280, 373
Farnsworth, Ex parte, 1 Lowell, 497 285
——— *v.* Taylor, 9 Gray, 162 415
Faunce *v.* State Assur. Co. 101 Mass. 279 61
Fay *v.* Sears, 111 Mass. 154 232
Fickett *v.* Durham, 109 Mass. 419 109
Field *v.* Hitchcock, 14 Pick. 405 122
——— *v.* Swan, 10 Met. 112 237
Finney *v.* Bedford Ins. Co. 8 Met. 348 60
Fish *v.* French, 15 Gray, 520 186
Fisk *v.* Cushman, 6 Cush. 20 139
Fitchburg Railroad *v.* Eastern Railroad, 6 Allen, 98 508
Flintham *v.* Bradford, 10 Penn. St. 82 255
Florence Sewing Machine Co. *v.* Grover & Baker Sewing Machine Co. 110 Mass. 70 340
Flynn *v.* Salem, 134 Mass. 351 566
Fouldes *v.* Willoughby, 8 M. & W. 540 520
Fowler *v.* Fowler, 33 Beav. 616 114
Fox *v.* Union Sugar Refinery, 109 Mass. 292 101
Francis *v.* Clemow, Kay, 435 64
Franklin Savings Institution *v.* Reed, 125 Mass. 365 377
Fraser *v.* Pendlebury, 10 W. R. 104 593
Freman *v.* Whitbread, L. R. 1 Eq. 266 453
French *v.* Merrill, 132 Mass. 525 22, 373
Fuentes *v.* Montis, L. R. 3 C. P. 268 167
——— *v.* ——— L. R. 4 C. P. 93 167
Fuller *v.* Cadwell, 6 Allen, 503 599
——— *v.* Knight, 6 Beav. 205 180
——— *v.* Percival, 126 Mass. 381 186
Furnas *v.* Durgin, 119 Mass. 500 299

Digitized by Google

Gannon v. Hargadon, 10 Allen, 106 15
Gardner v. Gardner, 3 Mason, 178 546
Gay v. Bowen, 8 Met. 100 579
——— v. Cambridge, 128 Mass. 387 149
Gaynor v. Old Colony & Newport Railway, 100 Mass. 208 501
Geddes v. Bennett, 6 La. An. 516 166
George v. Chambers, 11 M. & W. 149 185
——— v. Gobey, 128 Mass. 289 96
——— v. Reed, 101 Mass. 378 310
——— v. Spencer, 2 Md. Ch. 353 140
Gibbs v. Estey, 15 Gray, 587 484
Giddings v. Palmer, 107 Mass. 269 231
Gifford v. Choate, 100 Mass. 343 589
——— v. Helms, 98 U. S. 248 22
Giles v. Boston Fatherless & Widows' Society, 10 Allen, 355 114
Gilman v. Hunnewell, 122 Mass. 139 248
——— v. Wills, 66 Maine, 273 237
Gilmore v. Newton, 9 Allen, 171 527
Gilpin v. Enderby, 5 B. & Ald. 954 287
Gleason v. Fayerweather, 4 Gray, 348 589
Globe Works v. Wright, 106 Mass. 207 58
Goddard v. Sawyer, 9 Allen, 78 596
Goodrich v. Proctor, 1 Gray, 567 546
Gould v. Lakes, 6 P. D. 1 258
Grand Junction Railroad & Depot Co. v. County Commissioners, 14 Gray, 553 309
Great Barrington v. County Commissioners, 112 Mass. 218 432
Green v. Britten, 1 DeG., J. & S. 649 452
Greenwood v. Wakeford, 1 Beav. 576 180
Greville v. Browne, 7 H. L. Cas. 689 64
Grose v. Hennessey, 13 Allen, 389 29
Guild v. Butler, 127 Mass. 386 67, 244, 297
——— v. Guild, 2 Met. 229 251

Haldenby v. Spofforth, 1 Beav. 390 459
Hall v. County Commissioners, 10 Allen, 100 432
——— v. White, 106 Mass. 599 389
Hallett v. Hallett, 2 Paige, 15 546
Halsey v. McLean, 12 Allen, 438 592
Hammatt v. Wyman, 9 Mass. 138 71
Hammond v. American Ins. Co. 10 Gray, 306 366
Hampden Cotton Mills v. Payson, 130 Mass. 88 596
Hannum v. Tourtellott, 10 Allen, 494 366
Hapgood v. Blood, 11 Gray, 400 237
Harding v. Medway, 10 Met. 465 503
Harper v. Phœnix Ins. Co. 19 Mo. 506 177
——— v. Ross, 10 Allen, 332 400
Harrington v. King, 121 Mass. 269 302
Harris v. Carmody, 131 Mass. 51 259
——— v. Fly, 7 Paige, 421 65, 546
——— v. Watkins, Kay, 488 64
Hart v. Anthony, 15 Pick. 445 350
——— v. Frontino & Bolivia South American Gold Mining Co. L. R. 5 Ex. 111 184
Hartley v. Wilkinson, 4 Camp. 127 247
Harvard College v. Theological Education Society, 3 Gray, 280 428
Harvey v. Harris, 112 Mass. 32 436
Harwell v. Lively, 30 Ga. 315 255
Hastings v. Pratt, 8 Cush. 121 238
Hatch v. Hatch, 9 Mass. 307 312
Hawkes v. Phillips, 7 Gray, 284 244
Hawley v. Sage, 15 Conn. 52 378
Hawthorne v. Calef, 2 Wall. 10 592
Hayward v. Cain, 110 Mass. 273 459
Heapy v. Parris, 6 T. R. 368 354
Hemenway v. Gates, 5 Pick. 321 280
Henvell v. Whitaker, 3 Russ. 343 64
Herr's appeal, 5 Watts & Serg. 494 140
Hess's estate, 69 Penn. St. 272 73
Hess v. Singler, 114 Mass. 56 589
Higgins v. Andrews, 121 Mass. 298 219
——— v. Senior, 8 M. & W. 834 170
Hildreth v. Thompson, 16 Mass. 191 354
Hill v. Portland & Rochester Railroad, 55 Maine, 438 10
——— v. Raymond, 3 Allen, 540 30
Hills v. Snell, 104 Mass. 173 55
Hoadley v. County Commissioners, 105 Mass. 519 425
Hoare v. Bremridge, L. R. 8 Ch. 22 598
——— v. ——— L. R. 14 Eq. 522 598
Hodges v. Raymond, 9 Mass. 316 524
Hodgkins v. Moulton, 100 Mass. 309 334
Holden v. Fitchburg Railroad, 129 Mass. 268 566
——— v. Fletcher, 6 Cush. 235 117
Holland v. Martin, 128 Mass. 278 92
Holyoke Bank v. Burnham, 11 Cush. 183 242
Hood v. Aston, 1 Russ. 412 185
——— v. Lynn, 1 Allen, 103 479
Hooton v. Head, 3 Phillim. 26 253
Horne v. Midland Railway, L. R. 7 C. P. 583 592
——— v. ——— L. R. 8 C. P. 131 592
Hough v. Bailey, 32 Conn. 288 506
Howe v. Alger, 4 Allen, 206 101
——— v. Newmarch, 12 Allen, 49 97
Hubbard v. Lyman, 8 Allen, 520 95
Hudson v. Osborne, 39 L. J. (N. S.) Ch. 79 248
Huguenin v. Rayley, 6 Taunt. 186 58
Hume v. Richardson, 4 DeG., F. & J. 29 451
Hunneman v. Grafton, 10 Met. 454 380
Hunnewell v. Goodrich, 3 Cush. 469 296
Hunter v. Giddings, 97 Mass. 41 170
Huntington v. Knox, 7 Cush. 371 169
Huntley v. Whittier, 105 Mass. 391 39
Hyannis Savings Bank v. Moors, 120 Mass. 459 183
Hyde v. Baldwin, 17 Pick. 303 13
Hydraulic Engineering Co. v. McHaffie, 4 Q. B. D. 670 592

Ide v. Ingraham, 5 Gray, 106 579
Ilsley v. Merriam, 7 Cush. 242 488
Ingalls v. Herrick, 108 Mass. 351 165
Ingersoll v. Van Bokkelin, 7 Cow. 670 168
Insurance Co. v. Bailey, 13 Wall. 616 598

Digitized by Google

Insurance Co. v. Mosley, 8 Wall. 397 218
——— v. Tweed, 7 Wall. 44 176
Ipswich Mills v. County Commissioners, 108 Mass. 363 269
Ivay v. Hedges, 9 Q. B. D. 80 360
Ives v. Farmers' Bank, 2 Allen, 236 592

Jackson v. Phillips, 14 Allen, 539 427
Jacot v. Wyatt, 10 Gray, 236 392
James v. Cohen, 3 Curt. Ecc. 770 254
——— v. Marvin, 3 Conn. 576 254
Jeffreson v. Morton, 2 Wms. Saund. 12, n. 354
Jenkyns v. Usborne, 7 Man. & G. 678 167
Jennison v. Walker, 11 Gray, 423 107
Johns v. Church, 12 Pick. 557 596
Johnson v. Ames, 11 Pick. 173 231
——— v. Bartlett, 17 Pick. 477 66
——— v. Boston, 118 Mass. 114 352
——— v. Boston & Maine Railroad, 125 Mass. 75 176
Johnson's will, Re, 40 Conn. 587 258
Johnston v. Young, I. R. 10 Eq. 403 598
Jones v. McDermott, 114 Mass. 400 373
——— v. Newhall, 115 Mass. 244 599
Josslyn v. Commonwealth, 6 Met. 236 535

Keen v. Keen, L. R. 3 P. & D. 105 258
Keith v. Forbes, 3 Paton, 350 74
Kelley v. Drury, 9 Allen, 27 488
Kemp v. Tucker, L. R. 8 Ch. 369 598
Kennedy v. Duncklee, 1 Gray, 65 526
——— v. Standard Sugar Refinery, 125 Mass. 90 505
Kent v. Lee, 9 Gray, 45 349
Kid v. Johnson, 100 U. S. 617 248
Kidder v. Dunstable, 11 Gray, 342 96
Kidney v. Richards, 10 Allen, 419 190
Killea v. Faxon, 125 Mass. 485 352
Kimball, The, 3 Wall. 37 142
Kinmonth v. Brigham, 5 Allen, 270 451
Kirkcudbright v. Kirkcudbright, 1 Hagg. Ecc. 825 253
Kyle v. Kavanagh, 103 Mass. 356 436

Ladd v. Rogers, 11 Allen, 209 55
Lamphear v. Lamprey, 4 Mass. 107 340
Lanckton v. Wolcott, 6 Met. 305 296
Lane v. Crombie, 12 Pick. 177 501
Lang v. Bunker, 1 Allen, 256 393
Laugher v. Pointer, 5 B. & C. 547 170
Laughton v. Atkins, 1 Pick. 535 253
Lawson v. Morrison, 2 Dall. 286 255
Lawyer v. Smith, 8 Mich. 411 258
Leach v. Greene, 116 Mass. 534 37
Leather Cloth Co. v. American Leather Cloth Co. 11 H. L. Cas. 523 248
Leavitt v. Wooster, 14 N. H. 550 65, 546
Lee v. Lancashire & Yorkshire Railway, L. R. 6 Ch. 527 598
Lerned v. Johns, 9 Allen, 419 169
Lester v. Webb, 1 Allen, 34 180
Levi v. Brooks, 121 Mass. 501 98
Lewis v. Darling, 16 How. 1 64
Lidderdale v. Robinson, 2 Brock. 159 73
——— v. ——— 12 Wheat. 594 73
Life Association v. M'Blain, I. R. 9 Eq. 176 598
Lincoln v. Worcester, 8 Cush. 55 432
Lindenau v. Desborough, 8 B. & C. 586 58
Lingen v. Simpson, 1 Sim. & Stu. 600 231
Llewellyn's trust, Re, 29 Beav. 171 451
Lloyd v. Lloyd, 2 Sim. (N. S.) 255 114
Locke v. Homer, 131 Mass. 93 299
Loder v. Hatfield, 71 N. Y. 92 546
Lomas v. Bradshaw, 9 C. B. 620 287
Londesborough v. Somerville, 19 Beav. 295 453
Looney v. McLean, 129 Mass. 33 360
Low v. Pew, 108 Mass. 347 49
Lowell v. Boston & Lowell Railroad, 23 Pick. 24 375
——— v. Short, 4 Cush. 275 375
Lowell Gas Light Co. v. Bean, 1 Allen, 274 190
Luckett v. White, 10 Gill & J. 480 65
Lynam v. Union Railway, 114 Mass. 83 119
Lyons v. Desotelle, 124 Mass. 387 95

McAllister v. Burrill, 98 Mass. 334 190
McBride v. Little, 115 Mass. 308 599
McCarty v. Delaware & Hudson Canal, 17 Hun, 74 176
McCluskey v. Provident Institution for Savings, 103 Mass. 300 139
McDermott v. Boston, 133 Mass. 349 566
McDonald v. Snelling, 14 Allen, 290 11, 177
McGrath v. Merwin, 112 Mass. 467 95, 177
——— v. Reynolds, 116 Mass. 566 312
McIniffe v. Wheelock, 1 Gray, 600 366
McMurtrie v. Keenan, 109 Mass. 185 593
McNeil v. Collinson, 128 Mass. 318 200
McPartland v. Read, 11 Allen, 231 527
Macomber v. Parker, 14 Pick. 497 165
Madigan v. McCarthy, 108 Mass. 376 484
Magee v. Union Pacific Railroad, 2 Sawyer, 447 342
Mahon v. Blake, 125 Mass. 477 307
Mahone v. Manchester & Lawrence Railroad, 111 Mass. 72 340
Major v. Williams, 3 Curt. Ecc. 432 254
Malone v. Keener, 44 Penn. St. 107 143
Manuel v. Bates, 104 Mass. 354 393
Marble v. Worcester, 4 Gray, 395 11
Marden v. Jordan, 65 Maine, 9 237
Matthews v. Westborough, 131 Mass. 521 562
Maxham v. Day, 16 Gray, 213 185
Maxwell v. Heron, 3 Ross Lead. Cas. 129 74
Mayo v. Boston & Maine Railroad, 104 Mass. 137 500
Mellick v. Asylum, Jacob, 180 114

Digitized by Google

Merchants' Bank v. Cook, 4 Pick. 405 526
——— v. State Bank, 10 Wall. 604 457
Merrill v. Bickford, 65 Maine, 118 65, 546
——— v. Bullock, 105 Mass. 486 238
Meyer v. Simonsen, 5 DeG. & Sm. 723 451
Michigan State Bank v. Gardner, 15 Gray, 362 163
Miles v. Gorton, 2 Cr. & M. 504 142
——— v. Lynn, 130 Mass. 398 150
Milks v. Rich, 80 N. Y. 269 142
Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469 10, 176
Minor v. Sharon, 112 Mass. 477 359
Moggridge v. Thackwell, 7 Ves. 36 428
Moody v. Blake, 117 Mass. 23 167
Moore v. Moore, 1 Phillim. 406 258
Morris v. Bacon, 123 Mass. 58 585
Morrison v. Clark, 7 Cush. 213 380
——— v. Howe, 120 Mass. 565 524
——— v. McDermott, 6 Allen, 122 251
Morse v. Merritt, 110 Mass. 458 239
——— v. Newbury School District, 8 Allen, 307 188
Morton v. Morton, 4 Cush. 518 354
——— v. Mutual Life Ins. Co. 105 Mass. 141 340
Motley v. Downman, 3 Myl. & Cr. 1 248
Munde v. Lambie, 125 Mass. 367 190
Murray v. Berkshire Ins. Co. 104 Mass. 586 424
Mussey v. Beecher, 3 Cush. 511 164

National Bank v. Ins. Co. 95 U. S. 673 488
National Ins. Co. v. Allen, 116 Mass. 398 170
National Pemberton Bank v. Porter, 125 Mass. 333 180
Nelson v. McGiffert, 3 Barb. Ch. 158 254
New Bedford v. Hingham, 117 Mass. 445 439
New Bedford Institution for Savings v. Fairhaven Bank, 9 Allen, 175 586
Newburyport v. County Commissioners, 12 Met. 211 432
Newell v. Borden, 128 Mass. 31 25
New Haven & Northampton Co. v. Campbell, 128 Mass. 104 55, 307
New Milford National Bank v. New Milford, 36 Conn. 98 458
Nichols v. Allen, 130 Mass. 211 427
Nickerson v. Darrow, 5 Allen, 419 168
Northampton National Bank v. Massachusetts Loan & Trust Co. 123 Mass. 330 29
Norton v. Eastern Railroad, 113 Mass. 366 177
Nowell v. Wright, 3 Allen, 166 10

Oakman v. Dorchester Ins. Co. 98 Mass. 57 484
O'Brien v. O'Brien, 1 Molloy, 533 444
Ochsenbein v. Papelier, L. R. 8 Ch. 695 598
O'Connor v. Roberts, 120 Mass. 227 352
Odell v. Odell, 10 Allen, 1 113
Ogden v. Saunders, 12 Wheat. 213 489
Oliver v. Piatt, 3 How. 333 444
——— v. Washington Mills, 11 Allen, 268 423

Packard v. Wood, 4 Gray, 307 400
Page v. Cooper, 16 Beav. 396 459
——— v. Robinson, 10 Cush. 99 237
Paine v. Thacher, 25 Wend. 500 287
Parham Sewing Machine Co. v. Brock, 113 Mass. 194 141
Parker v. Baxter, 2 Gray, 185 87
Parks v. Boston, 15 Pick. 198 503
——— v. Newburyport, 10 Gray, 28 16
Parsons v. Dickinson, 11 Pick. 352 400
——— v. Goshen, 11 Pick. 396 479
Patterson v. Hickey, 32 Ga. 156 258
Paxson v. Potts, 2 Green Ch. 318 65
Payne v. Collier, 1 Ves. Jr. 170 180
Peck v. Waters, 104 Mass. 345 418
Penniman v. Cole, 8 Met. 496 366
Pennock v. McCormick, 120 Mass. 275 400
Perkins v. Whelan, 116 Mass. 542 29
——— v. Young, 16 Gray, 389 334
Phillips v. Soule, 6 Allen, 150 190
Phipps v. Johnson, 99 Mass. 26 520
Pidge v. Tyler, 4 Mass. 541 582
Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425 262
——— v. Lamson, 5 Allen, 60 186
Plummer v. Gray, 8 Gray, 243 472
Plymouth v. County Commissioners, 16 Gray, 341 269
Poe v. Duck, 5 Md. 1 489
Polak v. Everett, 1 Q. B. D. 669 244
Pomroy v. Lyman, 10 Allen, 468 95
Porter v. Stevens, 9 Cush. 530 232
——— v. Warren, 119 Mass. 535 350
Portland Bank v. Apthorp, 12 Mass. 252 425
Pratt v. Langdon, 12 Allen, 544 58
Prescott v. Read, 8 Cush. 365 137
Preston v. Preston, 2 Jur. (N. S.) 1040 64
Prout v. Root, 116 Mass. 410 586
Pym v. Campbell, 6 El. & Bl. 370 61

Railroad Co. v. Koontz, 104 U. S. 5 341
Ramsden v. Ambrose, 1 Stra. 127 418
——— v. Boston & Albany Railroad, 104 Mass. 117 98
Randall v. Beatty, 4 Stew. (N. J.) 643 255
Ray v. Underwood, 3 Pick. 302 350
Raynes v. Bennett, 114 Mass. 424 79
Read v. Stewart, 129 Mass. 407 472
Readman v. Conway, 126 Mass. 374 360
Reed v. Scituate, 7 Allen, 141 380
Regina v. Justices of Middlesex, 8 Dowl. & L. 109 392
——— v. ——— 2 New Sess. Cas. 73 392
——— v. ——— 14 L. J. (N. S.) M. C. 139 392

Digitized by Google

Regina v. Justices of Shropshire, 8 A. & E. 178 392
——— v. ——— 3 Nev. & P. 286 392
——— v. Longbottom, 3 Cox C. C. 439 213
——— v. Swindall, 2 Car. & K. 230 213
Reid v. Borland, 14 Mass. 208 253
Remington v. Allen, 109 Mass. 47 286
Removal cases, 100 U. S. 457 390
Rhoades v. Blackiston, 106 Mass. 334 37
Rice v. Dewey, 13 Gray, 47 586
Richards v. Stephenson, 99 Mass. 311 232
Richardson v. Reed, 4 Gray, 441 389
——— v. Robbins, 124 Mass. 105 30
——— v. Thomas, 13 Gray, 381 91
——— v. Wyman, 4 Gray, 553 296
Richmond Turnpike Co. v. Vanderbilt, 1 Hill (N. Y.) 480 97
Rickard v. Robson, 31 Beav. 244 114
Rigaut v. Gallisard, 7 Mod. 78 126
——— v. ——— 2 Ld. Raym. 809 126
——— v. ——— Holt, 50 126
Riley v. Farnsworth, 116 Mass. 223 340
Rindge v. Sandford, 117 Mass. 460 586
Robinson v. Waddington, 13 Q. B. 753 392
Roby v. Phelon, 118 Mass. 541 300
Rockwood v. Wiggin, 16 Gray, 402 312
Rogers v. Union Stone Co. 130 Mass. 584 36
Ross v. Noel, Bull. N. P. 136 418
Royal Bank of Liverpool v. Grand Junction Railroad, 100 Mass. 444 285
Royce v. Guggenheim, 106 Mass. 201 359
Rudisill v. Rodes, 29 Grat. 147 257
Russell v. Russell, 36 N. Y. 581 459
Ryder v. Wilcox, 103 Mass. 24 286
Ryerson v. Abington, 102 Mass. 526 193

Sage v. Ensign, 2 Allen, 245 577
Saltonstall v. Sanders, 11 Allen, 446 427
Sands v. Champlin, 1 Story, 376 65, 546
Sanger v. Bancroft, 12 Gray, 365 296
Sargent v. Essex Marine Railway, 9 Pick. 201 243
Scheffer v. Railroad Co. 105 U. S. 249 176
Schienfeldt v. Norris, 115 Mass. 17 120
Scholefield v. Redfern, 2 Dr. & Sm. 173 453
Scott v. Fink, 45 Mich. 241 255
Searle v. Sawyer, 127 Mass. 491 237
Sears v. Carrier, 4 Allen, 339 185
Seccomb v. Provincial Ins. Co. 4 Allen, 152 302
Shakeshaft, Ex parte, 3 Bro. Ch. 197 444
Shattuck v. Green, 104 Mass. 42 29
Shaughnessey v. Lewis, 130 Mass. 355 52
Shaw v. Poor, 6 Pick. 86 582
——— v. Spencer, 100 Mass. 382 459
Sheldon v. Purple, 15 Pick. 528 66
Short v. Woodward, 13 Gray, 86 58
Shurtleff v. Francis, 118 Mass. 154 312
Simmons v. Lillystone, 8 Exch. 431 520
——— v. Simmons, 26 Barb. 68 254
Slade v. Slade, 106 Mass. 499 354
Smales v. Dale, Hob. 120 86
Smith v. Burnham, 3 Sumner, 435 109
——— v. Conway, 121 Mass. 216 96
——— v. Gardner, 11 Gray, 418 96
——— v. Johns, 3 Gray, 517 596
——— v. Moore, 120 Mass. 222 405
——— v. Randall, 1 Allen, 456 393
——— v. Rines, 2 Sumner, 338 390
——— v. Smith, 14 Gray, 532 13
——— v. ——— 1 Root, 349 355
——— v. Warner, 133 Mass. 71 294
Sohier v. Johnson, 111 Mass. 238 248
Spelman v. Aldrich, 126 Mass. 113 140
Spofford v. Harlow, 3 Allen, 176 96
Spooner v. Holmes, 102 Mass. 503 520
——— v. Lovejoy, 108 Mass. 529 589
Spoor v. Holland, 8 Wend. 445 168
Spurr v. Benedict, 99 Mass. 463 436
Stackpole v. Arnold, 11 Mass. 27 60
Stanley v. Gaylord, 1 Cush. 536 167
State v. Manchester & Lawrence Railroad, 52 N. H. 528 214
Stearns v. Brown, 1 Pick. 530 122
Stetson v. Bass, 9 Pick. 27 122
——— v. Kempton, 13 Mass. 272 479
Stiles v. Davis, 1 Black, 101 290
Stoddard v. Doane, 7 Gray, 387 91
Stokes, Ex parte, DeG. 618 74
Stollenwerck v. Thacher, 115 Mass. 224 163
Stone v. Sargent, 129 Mass. 503 340
——— v. Walker, 13 Gray, 613 30
Strickland v. Barrett, 20 Pick. 415 520
——— v. Turner, 7 Exch. 208 436
Strong v. Jackson, 123 Mass. 60 585
Sudbury Parish v. Jones, 8 Cush. 184 484
Sugden v. St. Leonards, 1 P. D. 154 258
Swallow v. Emery, 111 Mass. 355 246
Swan v. Picquet, 4 Pick. 465 251
Sweet v. Stevens, 7 R. I. 375 61
Swift v. Pierce, 13 Allen, 136 30

Tapley v. Martin, 116 Mass. 275 340
Tarbell v. Parker, 106 Mass. 347 91
Taylor v. Preston, 79 Penn. St. 436 143
——— v. Taylor, 2 Nott & McC. 482 255
Terry v. Carter, 25 Miss. 168 506
Tewksbury v. County Commissioners, 117 Mass. 563 313
Thayer v. Dwight, 104 Mass. 254 165
——— v. Felt, 4 Pick. 354 366
——— v. Stevens, 11 Cush. 167 334
Third National Bank v. Eastern Railroad, 122 Mass. 240 285
Thompson v. Brown, 16 Mass. 172 117
——— v. Dolliver, 132 Mass. 103 165
——— v. Vinton, 121 Mass. 139 286
Thorndike v. Bath, 114 Mass. 116 165
Thrall v. Hill, 110 Mass. 328 49
Tingley v. Bateman, 10 Mass. 343 350
Tobey v. Taunton, 119 Mass. 404 101
Towle v. Towle, 114 Mass. 167 140

Digitized by Google

Towne *v.* Smith, 1 Woodb. & M. 115 489
Townsend *v.* Long, 77 Penn. St. 143 143
Trade-mark cases, 100 U. S. 82 248
Treat *v.* Boston & Lowell Railroad, 131 Mass. 371 482
Trecothick *v.* Austin, 4 Mason, 16 231
Troy National Bank *v.* Stanton, 116 Mass. 435 117, 156
Trueman *v.* Loder, 11 Ad. & El. 589 170
——— *v.* ——— 3 P. & Dav. 267 170
Turton *v.* Union Pacific Railroad, 3 Dill. 366 342

Ullman *v.* Barnard, 7 Gray, 554 168
Ungless *v.* Tuff, 9 W. R. 729 450
United States *v.* Howard, 3 Sumner, 12 529
Upton *v.* McLaughlin, 105 U. S. 640 22
Usticke *v.* Bawden, 2 Add. Ecc. 116 253
Utica Bank *v.* Van Gieson, 18 Johns. 485 373

Valpy *v.* Oakeley, 16 Q. B. 941 142
Van Winkle *v.* Houten, 2 Green Ch. 172 64
Venning *v.* Leckie, 13 East, 7 287
Vinal *v.* Burrill, 16 Pick. 401 579
Vincent *v.* Nantucket, 12 Cush. 103 479

Waite *v.* Littlewood, 41 L. J. (N. S.) Ch. 636 450
Walcott *v.* Keith, 2 Foster, 196 166
——— *v.* Swampscott, 1 Allen, 101 524
Walker *v.* Fitts, 24 Pick. 191 50
——— *v.* Sherman, 11 Met. 170 86
——— *v.* Staples, 5 Allen, 34 165
——— *v.* Towner, 4 Dill. 165 22
Wall *v.* Mason, 102 Mass. 318 71
Wallace *v.* Wallace, 8 Foster, 149 65
Walsh *v.* Wilson, 130 Mass. 124 88
Warner *v.* Abbey, 112 Mass. 355 49
Warren *v.* James, 130 Mass. 540 259
Waterhouse *v.* Kendall, 11 Cush. 128 334
Watkins *v.* Bowers, 119 Mass. 383 61
Watriss *v.* Cambridge National Bank, 124 Mass. 571 554
Watson *v.* Bourne, 10 Mass. 337 489
——— *v.* Sutherland, 5 Wall. 74 185
Weare *v.* Fitchburg, 110 Mass. 334 510
Webber *v.* Eastern Railroad, 2 Met. 147 18
Welch *v.* Phillips, 1 Moore P. C. 299 258
——— *v.* Wesson, 6 Gray, 505 96
Wellborn *v.* Weaver, 17 Ga. 267 312
Wetherbee *v.* Potter, 99 Mass. 354 109
Wheeler *v.* Howell, 3 Kay & Johns. 198 64
White *v.* Chapin, 12 Allen, 516 16
——— *v.* Lang, 128 Mass. 598 96, 177
Whiteley *v.* King, 10 Jur. (N. S.) 1079 258
Whitehill *v.* Shickle, 43 Mo. 537 287
Whitford *v.* Southbridge, 119 Mass. 564 510
Whitney *v.* Heywood, 6 Cush. 82 29
——— *v.* Stow, 111 Mass. 368 36
——— *v.* Wheeler, 116 Mass. 490 140
——— *v.* Whiting, 35 N. H. 457 489
Whittaker *v.* West Boylston, 97 Mass. 278 190
Wilcox *v.* Wilcox, 13 Allen, 252 13
Wilder *v.* Houghton, 1 Pick. 87 238
Wildes *v.* Dudlow, L. R. 19 Eq. 198 30
Williams *v.* Grealy, 112 Mass. 79 120
——— *v.* Henshaw, 11 Pick. 79 286
——— *v.* Jones, 3 H. & C. 602 170
Wills *v.* Lynn & Boston Railroad, 129 Mass. 351 176, 481
——— *v.* Simmonds, 8 Hun, 189 287
Wilson *v.* Queen Ins. Co. 5 Fed. Rep. 674 437
——— *v.* Wilson, 8 Phillim. 543 253
——— *v.* ——— 8 Hagg. Eccl. 329, n. 357
Wilton *v.* Webster, 7 C. & P. 198 125
Winch *v.* Hosmer, 122 Mass. 438 284
Winchester *v.* County Commissioners, 114 Mass. 481 309
Winnisimmet Co. *v.* Chelsea, 6 Cush. 477 432
Wood *v.* Firemen's Ins. Co. 126 Mass. 316 438
——— *v* Goodridge, 6 Cush. 117 459
——— *v.* Rowcliffe, 3 Hare, 304 186
——— *v.* ——— 2 Phil. 382 186
——— *v.* Wood, L. R. 1 P. & D. 309 254
Woodward *v.* Leavitt, 107 Mass. 453 190
——— *v.* Pickett, 8 Gray, 617 237
Worcester County Bank *v.* Dorchester Bank, 10 Cush. 488 278
Worthley *v.* Emerson, 116 Mass. 374 387
Wren *v.* Mosse, 1 Gilman, 560 355
Wright *v.* Boston & Maine Railroad, 129 Mass. 440 176
——— *v.* Madocks, 8 Q. B. 119 354
——— *v.* Wilcox, 19 Wend. 343 97
Wulff *v.* Jay, L. R. 7 Q. B. 756 244
Wyer *v.* Dorchester Bank, 11 Cush. 51 278

Yundt *v.* Hartrunft, 41 Ill. 9 125

Zeigler *v.* Day, 123 Mass. 152 352
Zouch *v.* Empsey, 4 B. & Ald. 522 392
Zuchtmann *v.* Roberts, 109 Mass. 53 165

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

MEMORANDUM.

ON the fifteenth day of December 1882, OLIVER WENDELL HOLMES, JR., Esquire, of Boston, was appointed a justice of this court, in place of Mr. Justice LORD, resigned, and took his seat on the bench on the third day of January 1883, at the term of the court then held at Boston in the county of Suffolk.

JOHN C. WOLCOTT *vs.* DWIGHT FRISSELL.

Berkshire. September 14, 1881; January 3. — 8, 1883.

Under the U. S. Rev. Sts. §§ 4785, 4786, 5485, or the U. S. St. of June 20, 1878, an attorney, who has received the fee therein prescribed for services in procuring a pension, is not entitled to maintain an action, against a person other than the pensioner, for a larger fee, upon an alleged promise of such person to pay him for his services as much as they were reasonably worth, there being no agreement in writing as to the amount to be paid him for his services.

CONTRACT upon an account annexed for $25, for services in procuring a pension for one Belinda French.

At the trial in the Superior Court, before *Pitman*, J., it appeared that the plaintiff was the attorney of record who prepared the papers and rendered the necessary services in procuring a

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pension from the United States government for Belinda French; and that the plaintiff had, upon the obtaining of such a pension, received a fee of $10, through the pension agent at Boston, as allowed by the department.

The plaintiff offered evidence tending to prove that he was originally employed by the defendant to procure such pension; and that the defendant promised to pay him for such services as much as they were reasonably worth. It was admitted that there was no agreement in writing between the plaintiff and the defendant, or with the pensioner or any other person, as to the amount to be paid the plaintiff for his services.

The defendant contended that the provisions of the U. S. Rev. Sts. §§ 4785, 4786, 4768, 4769 and 5485 barred the claim of the plaintiff. The plaintiff contended that, if his contract was made with the defendant, and not with the pensioner, these provisions of the statutes had no application to his case. But the judge ruled otherwise; and instructed the jury that the plaintiff could recover nothing, having already received the fee prescribed by law for such services.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. C. Wolcott, pro se.

E. M. Wood, for the defendant.

FIELD, J. It does not distinctly appear in the exceptions when the alleged contract was made, or when the services in procuring the pension were rendered, or when the claim for the pension was filed, but it is assumed that the time in each case was after the passage of the Revised Statutes of the United States. The defendant contends that §§ 4785, 4786, 4768, 4769 and 5485 of those statutes prohibit the plaintiff from receiving from any person for his services in securing a pension a greater sum than ten dollars, where no agreement "setting forth the fee agreed upon" has been executed by the parties and filed with the commissioner of pensions; and that, as the plaintiff has already received this sum, he can recover nothing, for services in procuring a pension, in this action. The plaintiff contends that these provisions of the statutes do not apply to a contract for services in procuring a pension made with another person than the pensioner.

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It is not disputed that it is within the power of the Congress of the United States, in granting pensions, to establish by statute the maximum amount which any person may receive for services in procuring a pension; and that any person who, after the passage of such statutes, renders such services, can recover only the compensation thus established. The dispute is upon the construction of the statutes. The principal object of these provisions of the statutes undoubtedly was to prevent oppressive charges, by determining the amount which should be received by attorneys for services in procuring pensions; and, for the security of the attorney, the amount was made payable to him directly out of the pension; but if attorneys were at liberty to make contracts for additional fees with third persons, this object of the law might in a great measure be evaded.

The money paid by third persons, even if it were not paid at the request of the pensioners, or if paid at their request, even if it were held that, by reason of the statute, no legal obligation rested on them to repay it, would in fact often be repaid by them to satisfy the moral obligation arising from an acceptance of the services. Whatever may be thought of the policy of establishing statutory fees for services that are not compulsory, such statutes, to be effectual in completely protecting the persons for whom the services are rendered, must prohibit all other compensation than that established by law, and thus compel persons either to receive only the statutory compensation or to abandon the business of rendering the service. It is provided by § 4786, that, if "no agreement is filed with and approved by the commissioner as herein provided, the fee shall be ten dollars and no more;" by § 4785, that "no agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars;" and § 5485 declares guilty of a misdemeanor "any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions."

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We think that it was the intention of Congress, by these provisions, to prohibit the receiving from any person whatever any compensation for services in procuring a pension, other or greater than that provided by the statutes.

If the claim for this pension was not filed, or if the plaintiff did not appear as agent or attorney therein until after the passage of the act of Congress of June 20th, 1878, entitled "An act relating to claim agents and attorneys in pension cases," and the plaintiff is thus brought within the provisions of this act, the result is the same, because the first section of the act makes it unlawful "for any attorney, agent or other person to demand or receive for his services in a pension case a greater sum than ten dollars," although the act repeals § 4785 of the Revised Statutes, and provides that §§ 4768, 4769 and 4786 of the Revised Statutes "shall not apply to any case or claim hereafter filed, nor to any pending claim in which the claimant has not been represented by an agent or attorney prior to the passage of this act." *Exceptions overruled.*

VALENTINE AMSTEIN *vs.* G. C. GARDNER.

Franklin. Sept. 19, 1882. — Jan. 8, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

Under the Sts. of 1875, *c.* 77, 1876, *c.* 150, 1878, *c.* 191, 1879, *c.* 141, and 1880, *c.* 261, an action may be maintained against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for an injury to property caused by the defective construction of the railroad, under such circumstances that an action could have been maintained had the road been owned by a corporation and not by the Commonwealth, although the defective construction was the act of a former manager.

In an action for an injury to a horse caused by the defective construction of a railroad, the testimony of an expert that, in his opinion, a cattle-guard or barrier was necessary at a particular point, is incompetent.

If a horse escapes from the control of the owner's agent, through his negligence, and, after running six hundred and fifty feet, enters upon the tracks of a railroad corporation at a point where there are no barriers, and, after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover.

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TORT against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for injuries occasioned to the plaintiff's horse by falling into the openings between the ties of a bridge in Buckland over which the railroad passed. After the former decision, reported 132 Mass. 28, the case was tried in the Superior Court, before *Knowlton*, J. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

H. Winn, for the plaintiff.

C. Delano, for the defendant.

C. ALLEN, J. The principal question in this case is, whether an action can be maintained against the defendant, as manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, to recover for an injury which occurred in consequence of defective construction, which was the work of his predecessor in office; or in consequence of the omission of his predecessor to build a necessary cattle-guard or barrier to keep animals from entering upon the railroad and passing along the track or the lands on the sides thereof, the presiding judge having ruled that the defendant might be held responsible for damages caused by the defective construction of the railroad while he was manager, but not for damages caused by such construction which was the work of a former manager. It is contended by the defendant, that such liability only exists in any case for negligence or default of the manager in reference to things which he could control without going to the Governor and Council for means or authority, as, for example, the selection and employment of men, the management of switches, &c.; and especially that this action, if maintainable at all, can only be maintained against the former manager. But an examination of the statutes has satisfied us that neither of these grounds of defence is well founded.

The legislation material to be considered began in 1875. At this time the railroad and tunnel were nearly ready to be opened for business. By the St. of 1875, *c.* 77, § 1, a manager was to be appointed "to take charge of the Troy and Greenfield Railroad and the Hoosac Tunnel, and manage the same in behalf of the Commonwealth." He was to be removable at the pleasure of the Governor and Council; and, in case of a vacancy from any cause, the vacancy was to be filled by a new appointment. The

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manager was to be "held responsible in person and property, for all damages sustained by any person or persons recoverable by law in consequence of the mismanagement of said railroad or tunnel, to the same extent as a railroad corporation established by this Commonwealth would be liable," and to be entitled to receive, from the earnings of said railroad and tunnel, compensation for the damages recovered against him, and costs incident thereto. By § 2, he was to supervise the completion and arching of the tunnel, "and the renovation of the said Troy and Greenfield Railroad." By § 3, the Governor and Council were to have "the said Troy and Greenfield Railroad renovated and relocated as far as they shall deem it advisable to adapt it for the transmission of passengers and freight." By § 5, reasonable tolls were to be prescribed by the Governor and Council, for the passage of cars with freight and passengers, &c.; and, in fixing such tolls, "due regard shall be had . . . . to the development of business, as well as to the cost of said tunnel." The St. of 1876, *c.* 150, § 6, provided that the manager, under the direction of the Governor and Council and with their approval, "shall have and exercise the power and authority conferred upon railroad corporations by the general railroad act" of 1874, for the purposes expressed in said act and a preceding one, viz. in renovating and relocating the road. Under the St. of 1878, *c.* 191, § 1, whenever judgment is recovered in an action for damages against the manager, under or by virtue of the provisions of the St. of 1875, *c.* 77, "no execution therefor shall be issued against the person or property of the said manager, but said judgment shall be paid out of the earnings of the road, in the hands of the treasurer" thereof; "and the manager shall be entitled to retain from the earnings of said road such sums as will be sufficient to pay and satisfy such judgment." By the St. of 1879, *c.* 141, § 1, it was provided that the treasurer of the railroad company should every month or oftener pay to the treasurer of the Commonwealth all moneys received on account of said railroad and tunnel, and should every month deliver to the auditor of the Commonwealth bills of all dues that might have become payable on account of said railroad and tunnel; and, when allowed, the amounts of such bills might be paid upon the warrants of the Governor and Council. By § 2, the manager was required to make a report

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to the Legislature annually of his doings, and of the earnings and expenses of said railroad and tunnel, with a detailed estimate of all sums to be required for the year next ensuing. The St. of 1880, *c.* 261, § 1, provided that the tolls fixed under the St. of 1875, *c.* 77, might be a proportionate part of the gross receipts of the railroad corporation using said railroad and tunnel; and § 3 authorized the manager, by direction of the Governor and Council, to make contracts with connecting railroads for the purpose of constituting through lines, and, in making such contracts, to agree to accept a *pro rata* of the through rates upon freight and passengers via such through lines.

Such was the state of the legislation at the time when the accident happened which is the subject of the present action; and the question to be determined is a question of the true construction of the statutes. It is urged, in behalf of the defendant, that the Commonwealth cannot be impleaded in its own courts, except by its own consent, clearly manifested by an act of the Legislature. But, without now considering how far this doctrine is applicable to its agents and servants, we are of the opinion that the Legislature intended to give its consent that the manager of its railroad might be sued in cases like the present. In undertaking the operation of the railroad, it is reasonable to think that the same responsibilities were intended to be assumed as ordinary railroad corporations are obliged to assume. The first section of the St. of 1875, *c.* 77, recognizes and declares this intention. The Legislature might well deem it a narrow policy for the State to undertake such management, without making adequate provision for meeting the ordinary responsibilities which are incident to this kind of business. Many of these are imposed by the common law on all common carriers of passengers and goods. Their expediency and wisdom have been recognized by the Legislature. The State, while holding all other and competing lines to a full measure of common law and statutory responsibility, might well hesitate to say to the public, "We invite your patronage for this line, but do not intend to furnish the same remedies, in case of loss or injury, as other lines are subject to." Such a course might well be thought, on the one hand, to take an unfair advantage of other railroads,

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and, on the other hand, to injure its prospect of ultimate success, and hinder or defeat the development of its business. No sanction is to be found in the statutes for such a view. It is nowhere provided that the rates of carriage, for passengers or freight, shall be less, in consequence of the more limited responsibility or less perfect remedies which will exist in case of loss. On the contrary, there are special and numerous provisions looking to a different result. The road is to receive its full *pro rata* proportion of through rates. If it could be supposed that, on merely business grounds, it was found expedient to put this road on a different footing from ordinary railroads in respect to liability for losses or injuries, it is reasonable to think that full and plain words to express that intention would be found in the statutes.

It is urged upon our attention, that the manager has not the power to expend money on works of construction until appropriations are made for the purpose, and then only under direction of the Governor and Council. Conceding the point, what follows? Does it follow, if insufficient appropriations are made to keep the road in proper order, and to erect suitable cattle-guards and barriers, and if, by reason thereof, animals come upon the track, or persons are run over, or trains are thrown from the track, or losses or injuries of any kind occur, that there is no responsibility on the part of any one therefor? We think not. It is suggested that there may be an application to the Legislature for relief. But this is not a legal remedy. Such an application is not made under any provisions of law, and its reception and the action to be taken upon it do not depend upon any rules of law, but upon the judgment, wisdom or favor of the Legislature itself.

We are also of the opinion that it was the intention of the Legislature to give this remedy, in cases where it properly exists at all, by an action brought against the manager who fills that position at the time when the remedy is sought; and that it is not limited to the particular manager through whose negligence or default the cause of action arose. Otherwise, a manager would be liable to be sued long after his retirement from office, when his official relations with the Commonwealth have ceased, and when he has no longer any interest or duty in relation to the

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defence of the action. It is not to be supposed that the Legislature would deem it expedient to entrust the interests of the Commonwealth to the care of a retired official, who might by possibility have been removed for cause, or have entered the service of a competing line or of an employer having an adverse interest.

A like result is reached from a consideration of the relations of the Commonwealth, as an owner of a railroad, towards the public whose patronage it invites. The manager is in the nature of a sole or quasi sole corporation. Otherwise the remedy provided for any party aggrieved would be very imperfect. The original construction, or repairs and improvements, may be begun by one manager and finished by another. An investigation may be needed to determine whether work, clearly insufficient or defective, was done under one manager or another. There might also be a concurring negligence of two or more successive managers. Work or safeguards, originally sufficient, may become insufficient, either through natural decay or wear, or through the increase of business or population. The State cannot itself be sued, and did not intend to allow an action to be brought directly against itself. Nevertheless, it was to engage in the business of operating a railroad, through an officer called the manager, whose office was designed to be permanent. One manager might die, resign or be removed. The individual might change; but the office was to be permanent. To the public, the manager was put forward as the representative of the authority which owns the railroad. A liability was imposed on him by statute. In form, this was at the outset personal. In substance and effect, it was official. And, since the passage of the St. of 1878, the liability of his person and property is taken away. He is merely left as the person to be named as defendant in the suit, and charged with the duty of defending it; but with no personal responsibility for the payment of the judgment, and indeed, since the passage of the St. of 1879, with no power even to retain the earnings of the railroad for the purpose of satisfying it.

The next question is whether it was competent for the plaintiff to introduce the testimony of an expert to show his opinion that a cattle-guard or barrier was necessary at a particular point.

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Such testimony was incompetent. The question involved a consideration of the amount of travel on the highway, and other things, suitable to be judged of by the jury. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469. *Nowell* v. *Wright*, 3 Allen, 166. *Hill* v. *Portland & Rochester Railroad*, 55 Maine, 438.

The instruction of the judge, as to the statutory duty of maintaining a fence or barrier at the place where the plaintiff's horse entered upon the railroad, as modified, was in conformity to what the plaintiff now contends is the true construction of the statute; but the plaintiff insists that the jury were nevertheless misled by the instruction, as originally given.* Since a new trial must be granted on other grounds, it is unnecessary to consider this ground of exception.

The instruction that, "if the plaintiff's son was negligent in not keeping a firm hold on the halter, and this negligence was partly the cause of, and contributed to, the accident, the plaintiff cannot recover," was right, so far as it went. The plaintiff, however, urges upon us that the alleged negligence of his agent was too remote to be properly considered as contributing to the injury to his horse. But no instruction upon this aspect of the question appears to have been asked for. If, through the negligence of the plaintiff's agent, his horse got away, and ran, and was injured at the distance and place shown by the plan which was put in evidence, and if it was found by the jury that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment fairly be considered to be a contributory cause of the injury, the plaintiff was not entitled to recover. It is not a case

* The judge, at the request of the defendant, instructed the jury as follows: "If the place where the horse entered on the railroad was a part of the yard and grounds used for shifting trains in connection with the Shelburne Falls station, or was within the highways or approaches entering upon or crossing said yard and grounds, the statute relating to fences and barriers does not apply." Upon objection being made by the plaintiff, the judge modified the instruction by instructing the jury that, if they found the place such as described, there was no statute which absolutely requires the erection of a fence or barrier there, but it was for them to determine whether the erection thereof was necessary and practicable.

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where, on the facts reported,* the court can say, as matter of law, that the negligence was too remote. *McDonald* v. *Snelling*, 14 Allen, 290, 296. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 474. Even on the doctrine of *Marble* v. *Worcester*, 4 Gray, 395, cited by the plaintiff, the negligence would not be too remote. In that case, a controlling consideration was, that the plaintiff was a stranger to all connection with the horse; and it was expressly said that the mere distance of place between the existence of the defect and the damage might not be sufficient to prevent a plaintiff from recovering.

Exceptions sustained.

ELISHABETHA SMITH *vs.* ELISHA WELLS, administrator.

Franklin. Sept. 19, 1882. — Jan. 3, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

The will of a married woman, to which her husband had not signified his assent, after giving several legacies, devised all the residue of her estate, real and personal, to her husband, he "to keep in good repair all the buildings during his lifetime," and appointed the husband executor. The only property left by the wife was the homestead estate where she had lived with her husband. He was duly appointed executor, gave a bond as such, but did not pay any of the legacies, and no demand was made upon him therefor, lived upon the estate until his death, eight years after his wife's, kept the buildings upon it in good repair, and assumed to dispose of it by will. *Held*, that an administrator with the will annexed of the wife's estate was rightly granted a license by the Probate Court to sell the estate for the payment of legacies, nine years after the death of the wife.

APPEAL from a decree of the Probate Court, granting to Elisha Wells, the administrator *de bonis non*, with the will annexed, of the estate of Emily Smith, leave to sell the real estate of the deceased for the payment of debts and legacies, on a petition dated January 21, 1882. The case was submitted to the judgment of this court upon an agreed statement of facts, in substance as follows:

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* The exceptions stated that the horse, after escaping from his keeper, ran a distance of six hundred and fifty feet before entering upon land of the railroad, and then ran five hundred and seventy feet to the bridge on which he was injured.

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Emily Smith, who was a married woman, died on November 9, 1873, leaving a will, in which her husband was named as executor, and which, after giving several legacies, one of which was a sum of money and all her furniture and wearing apparel, and providing for the erection of a monument to herself, contained the following clause: "I give and bequeath to Roland Smith, my dear husband, all the residue of my estate, both real and personal, except my household furniture and wearing apparel. Said Smith is to keep in good repair all the buildings during his lifetime." On December 2, 1873, the will was duly proved and allowed, and Roland Smith was appointed executor, and gave bond as required by law. The testatrix, at the time of her decease, was seised and possessed of a certain messuage and buildings, with land adjoining, as a homestead, in which she dwelt with her husband, the value of which, at the time of her decease, exceeded the amount of the legacies and reasonable charges of administration. She was not possessed of, and did not leave, any other property or estate, real or personal, which has come to the possession or knowledge of the appellant or appellee. She left no debts to be paid out of said estate; and her executor never filed an inventory or rendered an account in the Probate Court. Roland Smith continued to occupy said estate until his death, which occurred on November 16, 1881. He never paid the legacies bequeathed by the will, or in any way assented to them; and no demand was at any time made upon him by any of the legatees for the payment of the legacies, or any action or proceeding at law or in equity brought to enforce or obtain them. No monument was ever bought or erected, as provided by the will. Roland Smith, on April 20, 1874, was married to the appellant, who has since lived on said homestead. Roland Smith, as directed by the will, kept the buildings in good repair during his lifetime, and paid out, in addition, a certain sum for improvements. He died on November 16, 1881, and by his last will, duly executed, devised said estate and his other property in trust for the use of his widow and his sister for life. The will has been filed in the Probate Court, but has not yet been proved. The appellant has not relinquished her right of dower in the premises. Since the death of Roland Smith, administration has been duly granted to the appellee upon the estate of Emily Smith.

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It is contended by the appellee that said estate and homestead is, by the terms of the will, and on the facts above stated, liable to be taken and sold, and the proceeds applied on such trusts as remain to be discharged under said will.

It is contended by the appellant that there are no debts, legacies, or other trusts, remaining to be discharged under said will, which entitle the administrator to sell said estate, or render it liable to be taken and sold to pay the legacies or other charges.

If, upon the foregoing facts, there are any legacies, debts or charges of administration due from said estate, for the payment of which the estate and homestead can be lawfully sold by the administrator, the decree of the Probate Court is to be affirmed; otherwise, to be reversed.

Hearing before *C. Allen*, J., who reserved the case for the consideration of the full court.

C. G. Delano, for the appellant.

A. De Wolf, for the appellee.

C. ALLEN, J. The devise to the husband was not specific, in any such sense as to exonerate it from liability for the payment of debts and legacies. *Wilcox* v. *Wilcox*, 13 Allen, 252. He, by proving the will, by accepting the position of executor, by giving bond, and by continuing to occupy the real estate left by the deceased, adopted, ratified and confirmed the will, and became bound to execute it according to its terms; and he and all persons claiming under him are estopped from setting up any claim or right which would defeat it. *Hyde* v. *Baldwin*, 17 Pick. 303. *Smith* v. *Smith*, 14 Gray, 532. 2 Story Eq. Jur. § 1077. 1 Jarm. Wills, (5th Am. ed., by Bigelow) 443. The legacies are not barred by lapse of time. Gen. Sts. *c.* 97, § 22. Pub. Sts. *c.* 136, § 19. It is not necessary for the legatees to resort to an action on the executor's bond. The administrator may now do what it was the duty of the executor to do, namely, obtain a license to sell real estate for the purpose of paying the legacies. According to the agreement of the parties, therefore, the entry must be *Decree of Probate Court affirmed.*

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HENRY A. RATHKE *vs.* G. C. GARDNER.

Franklin. Sept. 19, 1882. — Jan. 9, 1883. FIELD & HOLMES, JJ., absent.

If the certificate of a presiding judge, under the Pub. Sts. *c.* 198, § 6, relating to costs, that an easement is concerned in an action, is based upon a ruling on a question of law, to which exception is taken, such ruling may be revised by this court.

In an action against a railroad corporation for diverting surface water and turning it upon the plaintiff's land, the evidence tended to show that the embankment of the railroad obstructed the flow of the surface water from the hills and down a ravine; and that the defendant had dug a ditch on the upper side of the road, and had thereby conducted said water a distance of several rods, and discharged it, through a culvert under the road, upon land of the plaintiff, where it had not been accustomed to flow. The defendant claimed the right to do this, on the ground that it was necessary to the proper construction and maintenance of the railroad. The jury returned a verdict of one dollar for the plaintiff. The question then arose as to the right of the plaintiff to costs; and the defendant asked the judge to rule that, "if the right claimed at the trial existed merely as incident to the right to construct and maintain a railroad, it would not constitute an easement." The judge "declined so to rule, and ruled to the contrary"; and thereupon made a certificate that a right to an easement was in fact involved in the action. *Held*, that no error appeared.

MORTON, C. J. The statute provides that, "when the right to an easement or the title to real estate is in fact concerned in an action, and the judge before whom the action is tried certifies such to be the fact, the party finally prevailing therein shall recover his full costs, without regard to the amount of damages recovered." St. 1862, *c.* 36, § 1. Pub. Sts. *c.* 198, § 6. Ordinarily, the certificate of the presiding justice, that the right to an easement or the title to real estate is, or is not, in fact concerned in the action, will be conclusive. But when the presiding justice bases his finding of the fact upon a ruling upon a question of law, to which exception is taken, this ruling may be revised by this court.

The case at bar is an action of tort against the state manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, in which the jury returned a verdict of one dollar. The declaration has two counts, but the bill of exceptions shows, we think, that there was no actual trespass which would sustain the second count, and that the verdict must have been rendered on the first count, for the acts of the defendant in diverting the surface

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water, and turning it upon the plaintiff's land. The evidence tended to show that the embankment of the railroad obstructed the flow of the surface water from the hills, and down a ravine; and that the defendant had dug a ditch on the upper side of the road, and had thereby conducted said water a distance of several rods, and discharged it, through a culvert under the road, upon land of the plaintiff, where it had not been accustomed to flow. The defendant claimed the right to do this, on the ground that it was necessary to the proper construction and maintenance of the railroad.

After the verdict, the question arose as to the right of the plaintiff to costs; and the defendant asked the court to rule that, "if the right claimed at the trial existed merely as incident to the right to construct and maintain a railroad, it would not constitute an easement." The court "declined so to rule, and ruled to the contrary," and thereupon made a certificate that a right to an easement was in fact concerned in the action.

No question is presented to us as to the liability of the defendant. Upon this matter, we must assume that correct instructions were given to the jury. The only question is whether the court erred in refusing the instruction requested.

As between the owners of contiguous estates, it is settled in this Commonwealth that the right of an owner of land to occupy and improve it as he may see fit, either by erecting structures or by changing the surface, is not restricted by the fact that such use of his own land will cause surface water to flow over adjoining lands in greater quantities, or in other directions, than they were accustomed to flow. If, by this use, the adjoining land is damaged, it is *damnum absque injuria*. *Gannon* v. *Hargadon*, 10 Allen, 106, and cases cited. This right exists in the owner by virtue of his dominion over his own soil, and not by virtue of any easement or servitude over the lower land. That this is so is clear from the fact that the adjoining owner may himself erect such structures or take such measures as he sees fit, on his own land, to divert the surface water and prevent its flowing upon his land, and in so doing he does not violate or obstruct any easement of the owner whose land is of a higher level. *Bates* v. *Smith*, 100 Mass. 181. So it has been held that, where surface water from the plaintiff's land has been accustomed to flow over

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adjoining land for more than twenty years, the owner of the adjoining land has the right to obstruct the flow and turn the water back upon the plaintiff's land without any liability for damages. *Parks* v. *Newburyport*, 10 Gray, 28.

But there is the well-settled distinction, that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land to its injury. And if he does this, and continues it adversely and under a claim of right for more than twenty years, he thereby acquires a right which is in the nature of a servitude or easement upon the lower land. *White* v. *Chapin*, 12 Allen, 516. *Curtis* v. *Eastern Railroad*, 14 Allen, 55, and 98 Mass. 428. *Cary* v. *Daniels*, 5 Met. 236.

As between adjoining landowners, therefore, if one owner thus discharged water through an artificial channel upon the lower land of the other, and if he claimed the right to do so, either by grant or prescription, the right to an easement would be concerned in the case. It has not been directly decided whether a railroad company, by virtue of its charter, if it is reasonably necessary to the proper construction and maintenance of its road, has the right to collect the surface water into an artificial channel and discharge it upon the adjoining land, and thus to subject such land to an easement or servitude.

In the case of *Babcock* v. *Western Railroad*, 9 Met. 553, the court expressed themselves as strongly inclined to the opinion, that, as the grant of authority to execute a public work carries with it a power to do all that is necessary to accomplish the object, the defendant in that case had authority under its charter to widen a watercourse on the plaintiff's land for the purpose of carrying off the water from its railroad. But it was not necessary in that case to decide this question.

In the case at bar, the bill of exceptions is short, and gives little of the history of the trial. It states that the defendant claimed the right to do the acts complained of, "on the ground that it was necessary to the proper construction and maintenance of said railroad." For aught that appears, the claim may

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have been that the charter gave him the right to collect the surface water in an artificial channel and discharge it upon the plaintiff's land. If so, he claimed the right to use the plaintiff's land for this purpose, which is a claim of a right to subject the land to a servitude or easement. The fact that the right "existed merely as incident to the right to construct and maintain a railroad," would not make it any the less an easement. The bill of exceptions, therefore, does not show any error in the ruling of the court. *Exceptions overruled.*

C. Delano, for the defendant.

S. T. Field, for the plaintiff.

WILLIAM H. PHELPS *vs.* HENRY W. WEBSTER & others.

Franklin. Sept. 21, 1881; Sept. 20, 1882. — Jan. 9, 1883. COLBURN & HOLMES, JJ., absent.

The proprietors of a town in 1684 laid out two highways through the town, ten rods wide, crossing each other at a right angle. In 1723 they laid out a lot at the intersection of the two highways, describing it as "left for the minister," and as bounded "against" one of them, and as "butting" upon the other. Neither in 1684 nor in 1723 had the proprietors of a town any authority to lay out highways or town ways. From time immemorial the town used a portion of the way laid out in 1684 for a schoolhouse, and up to 1860 maintained a hearse-house upon it, and in 1811 the town voted to give a lot of land within the way to the Commonwealth for a gun-house. *Held*, that by the grant of 1723 the fee to the centre of the ways did not pass, and that the lot was bounded by the external lines of the ways.

TORT, for breaking and entering the plaintiff's close in Northfield. Writ dated August 6, 1880. Answer: 1. A general denial. 2. That the acts alleged to have been committed by the defendants were done by them, as a committee of a school district in Northfield, in a place laid out by the original proprietors of the town in 1684 as a highway, and that in 1723 the said proprietors made a grant to the plaintiff's grantor of land abutting upon the highway, no part of which was included within the highway.

At the trial in the Superior Court, before *Colburn*, J., the judge ruled that the action could not be maintained, directed a verdict

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for the defendants, and reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict to be set aside, and a new trial granted. The facts appear in the opinion.

The case was argued at the bar in September 1881, by *S. O. Lamb*, for the plaintiff, and by *C. C. Conant*, for the defendants; and was reargued in September 1882 by the same counsel.

MORTON, C. J. The records of the original proprietors of Squakheag, now the town of Northfield, show that in 1684 said proprietors laid out a highway ten rods wide, which has ever since existed, marked by fences on each side, and which is the road to which the controversy in this case relates. The report of the committee upon which this action was taken is as follows: "May 28, 1684. Wee hose names are under wrighten have layed out the high wayes of Squawkheag town plot 10 rods wide through the town and a highway one the north side of Mikah Mudg hom lott & the south side of John Alexander hom lott ten rod wid to the meadow fence and soe it runs into the woods estward." The records also show that in 1723 a lot of land was laid out for the minister, which is described as follows: "A home lott, left for the minister, containing seven acres & a half, bounded southerly against the highway that runs across the town, from the meetinghouse, running easterly into the woods, buting westerly upon the brawd street, that runs threw the town, and northerly against Jacob Roots hom lott, being in width 20 rods."

The plaintiff now owns this lot, and his claim is that, under this grant, he owns the fee to the centre of the road which runs easterly. This is a vital question in the case. Unless the grant of the proprietors conveyed the fee to the centre of the road, as parcel of the lot described, no subsequent deed by the grantee or his successors in title could convey it, and the plaintiff shows no title to the locus.

The general rule in this Commonwealth is, as stated in *Boston* v. *Richardson*, 13 Allen, 146, that a deed bounding land generally by a highway, with no restrictive or controlling words, conveys the grantor's title in the land to the middle of the highway. But it is a rule of construction, and, as stated by Chief Justice Shaw in *Webber* v. *Eastern Railroad*, 2 Met. 147, 151, and approved by the court in *Codman* v. *Evans*, 1 Allen, 443,

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446, it is "a question of construction in each particular case, and depends, as in all other cases, upon the intent of the parties, as expressed in the descriptive part of the deed, explained and illustrated by all the other parts of the conveyance, and by the localities and subject matter to which it applies."

There are features in the deed we are construing, and in the subject matter and localities and surrounding circumstances, which seem to us to indicate the intention that the minister's lot should be bounded by the sides, and not the centres, of the roads on two sides of it. The original proprietors were the owners of the whole township; it seems that they had made a plot or plan of their lands as early as 1684, as the report of the committee quoted above speaks of the "Squawkheag town plot;" they then set apart and appropriated to public use, under the name of highways, two strips of land ten rods wide and crossing each other at right angles; they from time to time set apart or granted to different persons home lots, and in 1723 they set apart the minister's lot, describing it as "a home lott left for the minister." This expression implies that the lot for the minister was something that remained, or which was not taken by the appropriations of their land previously made, and has some tendency to show that they regarded it as outside of the land set apart for public uses, and not as including a part of that land.

It is to be observed that neither in 1684 nor in 1723 had the proprietors any authority to lay out highways or town ways, that authority being vested in 1684 respectively in the County Court and selectmen. Anc. Chart. 127. And in 1693 the authority to lay out highways was vested in the Court of Quarter Sessions of the Peace. St. 1693–4, (5 W. & M.) *c.* 6, § 3; 1 Prov. Laws, (State ed.) 136. Anc. Chart. 268. It is to be presumed that the proprietors knew this, and, although their records speak of having "layed out the highways" ten rods wide, we think these words were not used in the sense of a technical laying out, by which only an easement for the purpose of travel is granted to the public. They appear to have used the expression "laid out" in reference to the granting of the minister's lot, where they clearly intended to grant a fee. It was shown in evidence that, after this so-called "laying out" in 1684, the town continuously used the land thus "layed out" for purposes other than those of

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travel, and which were inconsistent with the existence merely of an easement for travel. The part of the road which runs eastward from the Main Street, usually travelled, is narrow; as the travelled track approaches Main Street it divides into two tracks, leaving a triangular lot five or six rods wide on Main Street and coming to a point about eighteen rods easterly. This triangular piece is opposite the plaintiff's lot, and is the locus in controversy. It appeared that the town had from time immemorial maintained a schoolhouse upon this lot; also, that from a period as long ago as any one can remember, and up to within twenty years, it had maintained a hearse-house within the limits of said road; also, that in 1811 the town voted to give a lot of land within the way to the Commonwealth for a gun-house, and by its selectmen executed a deed of the lot to the Commonwealth, and that a gun-house was erected and remained upon it for about forty years.

We refer to these facts not as showing a title in the town by adverse possession, which may be a question of fact for the jury, but as furnishing some assistance in the construction of the record, which is so brief and imperfect. They show the practical construction which the parties interested put upon the acts of the proprietors, and tend to show that the proprietors intended to dedicate this strip of land ten rods wide, not merely for purposes of travel, but for other public uses, and thus to throw light upon their intentions when, in 1723, they set apart a home lot left for the minister.

Again, other language used in the descriptive part of the grant of the minister's lot aids this theory. It is bounded southerly "against" the highway that runs from the meeting-house easterly into the woods, and "buting" westerly upon the broad street that runs through the town. Undoubtedly the words "against" and "buting" are used in the same sense. Each expression imports that the lot does not include any part of the highway. Two pieces of land abut upon each other when their ends meet, not when one overlaps the other. The word "against" implies, in all senses in which it is used, opposition. One piece of land cannot be aptly said to be against another if it includes a part of the latter. We do not mean to say that either of these features of the grant, standing alone,

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would necessarily take a case out of the general rule. But the combined effect of all the matters to which we have alluded is to produce the conviction that the proprietors in their grant of the minister's lot in 1723 did not intend to grant the fee to the centre of the ways on which it abutted, but intended that the lines of the lot should be the external lines of the ways.

It follows that the plaintiff cannot maintain this action. He shows no record title, and the evidence does not show any possession which, in the absence of a record title, would enable him to maintain the action. *Judgment on the verdict.*

JOSEPH M. ROSS *vs.* GEORGE WILCOX.

Hampden. Sept. 26, 1882. — Jan. 3, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

Under the U. S. Rev. Sts. § 5057, an action by an assignee in bankruptcy to collect a debt due to the estate must be brought within two years from the time when the cause of action accrued to the assignee.

CONTRACT upon an account annexed, by the assignee in bankruptcy of John Hood, for goods sold and delivered by the bankrupt to the defendant. Writ dated September 13, 1881. Answer: 1. A general denial. 2. The statute of limitations, U. S. Rev. Sts. § 5057.

At the trial in the Superior Court, before *Knowlton*, J., the plaintiff offered evidence tending to show that he was appointed assignee in bankruptcy of John Hood on May 19, 1875; that Hood, before his bankruptcy, namely, on September 8, 1874, sold to the defendant a set of wheels for $16, which sum the defendant had never paid; and that this claim, with others, had been sold by the plaintiff to F. H. Maxwell, for whose benefit this action was brought.

Upon this evidence, the defendant asked the judge to rule that this claim, being for a debt due the bankrupt's estate, was barred by the U. S. Rev. Sts. § 5057. The judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

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J. M. Ross, pro se.

W. B. Stone, for the defendant.

C. ALLEN, J. The only question in this case is, whether an action by an assignee in bankruptcy to collect a debt due to the estate must be brought within two years from the time when the cause of action accrued to the assignee. According to the construction which has been given to the U. S. Rev. Sts. § 5057, by the Supreme Court of the United States, it must be; and the present action is therefore barred. *Bailey* v. *Glover*, 21 Wall. 342. *Gifford* v. *Helms*, 98 U. S. 248. See also *Walker* v. *Towner*, 4 Dill. 165; *Upton* v. *McLaughlin*, 105 U. S. 640; *French* v. *Merrill*, 132 Mass. 525. *Exceptions overruled.*

GEORGE W. RAY & others *vs.* LEWIS J. POWERS & another.

Hampden. Sept. 26, 1882. — Jan. 3, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

The constitution of a voluntary association defined its object to be to stimulate a healthy interest in the breeding and management of pigeons and bantams, and to disseminate useful knowledge in relation thereto; gave the board of directors the charge and management of all public exhibitions of the society; and provided that each member should pay an initiation fee and an annual assessment. The society held a public exhibition and awarded premiums, and the expenses, including the premiums, were greater than the receipts. *Held*, that a bill in equity could be maintained, by those members who paid the loss, against other members for contribution, if the defendants participated in a vote to give the exhibition with premiums, or if they assented to such vote.

BILL IN EQUITY, by certain members of the New England Pigeon and Bantam Society, a voluntary association, against Lewis J. Powers and Charles S. Lincoln, to compel the defendants, as members of the society, to contribute their respective proportions of the amount of money lost on account of a public exhibition of the society, which loss the plaintiffs have been obliged to pay, and have paid in full.

At the hearing before *W. Allen*, J., William G. White, one of the plaintiffs and the treasurer of the society, testified substantially as follows: The New England Pigeon and Bantam Society

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was organized at Springfield on April 4, 1878, and the persons mentioned in the bill were members thereof. The object of the society was to hold public exhibitions of pigeons and bantams, and the awarding of money premiums thereat, by judges selected for the purpose. The second meeting of the society was held on July 10, 1878, at which meeting a constitution and by-laws were adopted, by vote of the members present.* At this meeting, it was also voted that the society give a public exhibition in Springfield on December 10, 11, 12 and 13, 1878, and that the control and management of the same be referred to the board of directors. At a meeting of the society, held on July 31, 1878, a premium list of the exhibition was adopted by vote of the society. This premium list contained an accurate statement of all premiums that were offered and to be awarded at said exhibition, and the amount of money which would be required to pay the same. It also contained the rules which had been adopted for the management of the exhibition, and the constitution and by-laws of the society. At this meeting, the defendant Lincoln was present, and joined the association. A copy of this premium list was sent to every member of the association as soon as printed, which was directly after this meeting. The defendant Lincoln acted as judge at the exhibition referred to, and awarded a part of the premiums offered in said premium list.

White also testified that he personally requested the defendant Powers to join the society, informed him that there was to

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* The constitution and by-laws of the society were put in evidence. Article 2 of the constitution defined the object of the society to be "to stimulate a healthy interest in the breeding and management of pigeons and bantams; to disseminate useful knowledge in relation thereto; and to establish an authoritative standard of excellence for the breeding and judging of pigeons."

Article 4, after defining the duties of various officers, was as follows: "The board of directors shall have the general control and management of all the affairs of the society, not herein delegated to other officers, shall have charge of, and be responsible for, all the property of the society except money in the treasury, and shall have the charge and management of any and all public exhibitions of the society."

Article 5 provided for the election of members, and also for the payment by each member of an initiation fee of $3, and an annual assessment of $2.

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be a public exhibition at the time before stated, and desired his assistance at said exhibition; that he told Powers the amount which had been offered for premiums and the probable expenses of the exhibition, and sent him a copy of the premium list; that Powers objected to joining the society because it was not incorporated, and because he would be personally responsible in case of loss; that the witness told Powers that the society had voted to instruct the president to procure an incorporation of the society, and, after it was incorporated, there would be no personal liability; that Powers consented to become a member of the association, and that no meeting of the society was held after he became a member.

White also testified that no record was kept by the secretary of the doings of the society at its various meetings; that the exhibition was held under the management of the board of directors, and resulted in great loss, and the plaintiffs had paid the same; that, previous to the exhibition, a subscription paper to raise a fund to guarantee the society against loss was subscribed by a few members of the society, and by a number of persons who were not members thereof, but the money thus raised was not sufficient to pay the loss; and that the money paid by the plaintiffs was almost entirely in payment of the premiums awarded at said exhibition.

Lincoln testified that he received by mail a copy of the premium list referred to after it was printed, but did not read it, and was not familiar with its contents until a few days before the exhibition; that he had no knowledge of the provisions of the constitution and by-laws prior to its reception by mail, and prior to his becoming a member; that he acted as judge at said exhibition at the request of the officers of the society; and that he had before acted in the same capacity at other exhibitions of other societies.

Powers testified that he joined the society, if he joined it at all, some time during October or November 1878; that, after the conversation testified to by White, he consented to have him present his name for membership, and paid him the initiation fee of $3; that he had no recollection of receiving the premium list and constitution and by-laws referred to; that he never received any notice of a meeting of the society, and never attended

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any; that he took no part in the exhibition, but attended it, and paid his admission fee thereto the same as others did.

The judge ruled that the evidence was not competent and sufficient to maintain the bill; ordered that the bill be dismissed; and, at the plaintiffs' request, reported the case for the determination of the full court. If the ruling was correct, the decree was to be affirmed; otherwise, such decree to be entered as the court might direct.

W. G. White, for the plaintiffs.

E. H. Lathrop & T. M. Brown, for the defendants.

C. ALLEN, J. This bill was dismissed on the ground that the evidence was not competent and sufficient to maintain it. But, upon consideration, we think the evidence might have warranted a decision for the plaintiffs, as against both of the defendants. It is true that neither the constitution nor the by-laws of the society provide for holding exhibitions with premiums, or for any further liability on the part of the members than for the payment of the initiation fee and annual assessment. But it was not inconsistent with the purposes of the society, as shown by the constitution, to hold exhibitions and award premiums. Mere membership would not bind anybody for any further payment than the initiation fee and annual assessment; but such members as participated in a vote to incur further expenses for an exhibition with premiums, or as assented to be bound by such vote, would be bound thereby. It therefore became a question of fact whether either or both of the defendants so participated or assented. It was not necessary to prove such participation or assent by formal records. *Newell* v. *Borden*, 128 Mass. 31, 34. The testimony introduced was competent, and its sufficiency should be determined as a question of fact.

Case to stand for a further hearing.

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ALBERT WEBER, JR., administrator, *vs.* EDWARD F. COUCH & another.

Hampden. January 6. — 22, 1883.

A parol release of a judgment for money, in consideration of the payment of a less sum, is invalid, although such release is indorsed upon the execution issued in the original action.

HOLMES, J. This is an action on a judgment for $1154.71, against Edward F. Couch and A. C. Couch, copartners. After that judgment was recovered, one of the defendants paid $100 upon it, and the following agreement was indorsed on the execution: "In consideration of the sum of one hundred dollars paid by Edward F. Couch, one of the within-named judgment debtors, I hereby release said Edward F. Couch from any and all liability on the said judgment, and acknowledge satisfaction of the within judgment so far as said Edward F. Couch is concerned, but reserve to myself the right to avail myself of certain securities, to wit, notes and mortgages in the hands of one A. H. G. Lewis, put up by one John Snow, of Providence, R. I., to release the attachment.

"Albert Weber. By Buckland & White, his attorneys."

The defendant E. F. Couch has died pending this action, but the other defendant insists that the above transaction discharged E. F. Couch, and therefore discharged him, the other joint debtor. To make out that E. F. Couch was discharged, the defendant suggests that the consideration of the dealing with him consisted of the securities mentioned as well as the money. But there is nothing outside of the instrument to countenance this suggestion, and the instrument itself expressly contradicts it. It states the consideration to be one hundred dollars and nothing else. It does not disclose the acquisition of any new rights in the securities by the plaintiff, or any change of position on the part of the defendant. Indeed, so far as appears, the defendant was a stranger to the securities, which were "put up by one John Snow." The defendant's argument therefore fails. A parol release of a judgment for money, in consideration of a payment of a smaller sum, is invalid at common law.

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The defendant does not argue that the release had any greater effect because written on the execution, than it would have had if it had been written on any other piece of paper. It is still a parol release addressing itself directly to the judgment, which it is incompetent to discharge in that way. Neither can it have a greater indirect operation than it could have had directly. To that end it would be necessary first to read the release as purporting to discharge the execution, because it was indorsed on the writ, and because, if it had been effectual to discharge the judgment, it would have discharged the execution, and then, after providing this substituted machinery, to hold that the parol release of the execution was conclusive, and that the discharge of the judgment followed. This is impossible, and it is therefore unnecessary to consider what the effect of the indorsement would have been upon the liability of the other defendant if it had been valid; whether it would have discharged him apart from the reservations, and whether the reservations were sufficient to cut the words of release down to a covenant not to sue. *Judgment for the plaintiff.*

E. B. Maynard & H. C. Bliss, for A. C. Couch, cited *Ward* v. *Johnson*, 13 Mass. 148; *Tuckerman* v. *Newhall*, 17 Mass. 581; *Reed* v. *Bartlett*, 19 Pick. 273; *Brooks* v. *White*, 2 Met. 283.

W. G. White, for the plaintiff.

JOHN STRATTON *vs.* RALPH C. HILL.

Worcester. Oct. 3, 1882. — Jan. 8, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

At the trial of an action for breach of an agreement to save the plaintiff harmless from all loss by reason of any liens and encumbrances upon a horse, alleged to have been bought by the plaintiff of a third person, an affidavit put in evidence tended to show that the plaintiff bought the horse of the defendant. The judge instructed the jury that, "if the testimony as given in the affidavit is a full and true statement of the contract and arrangement whereby the plaintiff obtained the horse, he cannot recover in this action, because the contract therein stated is materially different from that set out in the declaration." *Held*, that the plaintiff had no ground of exception.

At the trial of an action for breach of an agreement to save the plaintiff harmless from all loss by reason of any liens and encumbrances upon a horse, alleged

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to have been bought by the plaintiff of L., and on which the defendant held a mortgage, and of a warranty that the horse was free from all encumbrances, the answer to which set up the statute of frauds, the plaintiff asked the judge to rule that "if the defendant said to the plaintiff, 'I will guarantee the horse to you in case you will buy him of L.,' that contract would not be within the statute of frauds;" and that "if the plaintiff said to the defendant, 'I will buy the horse of L. if you will guarantee the title, but not otherwise,' and the defendant said, 'All right, I will so guarantee the title if you will pay me $50 of the purchase money,' that contract would not be within the statute of frauds." The judge declined so to rule, but gave full general instructions upon the statute of frauds, which were not excepted to, and which did not appear in the bill of exceptions. *Held*, that the plaintiff had no ground of exception.

CONTRACT. The declaration alleged that, on September 6, 1878, the plaintiff bought a horse of one Lynch, upon which the defendant then held a mortgage for the sum of $125; that the defendant, in consideration of the payment to him by the plaintiff of the sum of $50, promised to save the plaintiff harmless from all loss by reason of any liens and encumbrances upon the horse, and warranted that the horse was free from all encumbrances; and that, at the time of said promise and warranty, there was a mortgage on the horse held by one Bailey, who has since taken the horse from the possession of the plaintiff by virtue of said mortgage, and the horse was wholly lost to the plaintiff. Answer: 1. A general denial. 2. The statute of frauds. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. Hopkins, for the plaintiff.

T. G. Kent, for the defendant.

FIELD, J. The instruction that, "if the testimony of Cook as given in the affidavit is a full and true statement of the contract and arrangement whereby the plaintiff obtained the horse, he cannot recover in this action, because the contract therein stated is materially different from that set out in the declaration," was correct. The affidavit, if it was a full and true statement of the contract, tended to show that the plaintiff bought the horse of the defendant, and the declaration alleges that he bought it of Lynch.

The exceptions state, "that full general instructions were given upon the statute of frauds, to which no exceptions were

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taken; but that the presiding justice refused to give two instructions asked for by the plaintiff, which were: "If the defendant said to the plaintiff, 'I will guarantee the horse to you in case you will buy him of Lynch,' that contract would not be within the statute of frauds;" and "If the plaintiff said to the defendant, 'I will buy the horse of Lynch if you will guarantee the title, but not otherwise,' and the defendant said, 'All right, I will so guarantee the title if you will pay me $50 of the purchase money,' that contract would not be within the statute of frauds."

The defendant was a mortgagee of the horse. Lynch was the owner of the equity of redemption, subject to the mortgage to the defendant and to another mortgage to one Bailey. The plaintiff declares upon a sale by Lynch, and not upon a sale by Lynch and the defendant. No warranty of title can therefore be implied against the defendant as one of the vendors. The alleged promise of the defendant was upon a good consideration moving directly from the plaintiff to the defendant; but this alone will not take the case out of the statute. *Ames* v. *Foster*, 106 Mass. 400.

The defendant contends that the alleged promise was one to answer for the default of Lynch, who as vendor warranted the title. In this Commonwealth, a vendor of personal chattels which are in his possession, who sells them as his own, impliedly warrants the title, although this implication may be controlled by the terms and circumstances of the sale, if they show that it was not the intention of the parties that the vendor should warrant the title. *Buckman* v. *Goddard*, 21 Pick. 70. *Coolidge* v. *Brigham*, 1 Met. 547. *Dorr* v. *Fisher*, 1 Cush. 271. *Whitney* v. *Heywood*, 6 Cush. 82. *Grose* v. *Hennessey*, 13 Allen, 389. *Perkins* v. *Whelan*, 116 Mass. 542. *Shattuck* v. *Green*, 104 Mass. 42. *Northampton National Bank* v. *Massachusetts Loan & Trust Co.* 123 Mass. 330.

The defendant's evidence tended to show that he received the fifty dollars in consideration of his assenting to the sale made by Lynch, and of his releasing his claim under his mortgage.

The plaintiff introduced evidence that the defendant guaranteed to him that the title to the horse was free from encumbrance, and testified "that he thought Lynch's guaranty of title

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was not sufficient, and that he relied upon him guaranteed by the defendant." The promise declared on is a promise to save the plaintiff harmless from all loss by reason of liens and encumbrances upon the horse, or a warranty that the title to the horse was free from all encumbrances. The plaintiff's evidence was not of a promise to the plaintiff to pay Bailey's mortgage, which, as a promise, not to a creditor to pay the debt of a third person, but to the plaintiff to pay a debt which was a charge upon the plaintiff's property, might not be within the statute. See *Alger* v. *Scoville*, 1 Gray, 391; *Carr* v. *Dooley*, 119 Mass. 294.

It is sometimes said that a mere promise of indemnity is not within the statute. *Aldrich* v. *Ames*, 9 Gray, 76. *Wildes* v. *Dudlow*, L. R. 19 Eq. 198. But whatever the promise may be called, if it is "a special promise to answer for the debt, default or misdoings of another," and that is its principal object, it would seem that it is within the statute. *Cripps* v. *Hartnoll*, 4 B. & S. 414. *Dows* v. *Swett*, 120 Mass. 322.

An agreement to guarantee the title to personal chattels may be an independent original agreement, or it may be collateral to the express or implied warranty of title by another person. If it is made as a part of the bargain and sale of the chattels, but by a person other than the vendor, an important fact to be determined is whether the vendor by the sale expressly or impliedly warranted the title; if he did, the inference may be that the guaranty is collateral to the warranty of the vendor, and is in substance a guaranty that the vendor will keep his contract of warranty, and not make default. The question whether the promise of the defendant in this case was a promise to answer for the default of another, has some analogy to the question which arises upon the sale and delivery of merchandise to one person upon the promise of another to pay for it. *Cahill* v. *Bigelow*, 18 Pick. 369. *Chapin* v. *Lapham*, 20 Pick. 467. *Stone* v. *Walker*, 13 Gray, 613. *Hill* v. *Raymond*, 3 Allen, 540. *Swift* v. *Pierce*, 13 Allen, 136. *Dean* v. *Tallman*, 105 Mass. 443. *Richardson* v. *Robbins*, 124 Mass. 105.

Evidence is recited in the exceptions from which the jury might have found that Lynch either expressly or impliedly warranted the title to the horse, and that the defendant's promise was collateral to this, and was a guaranty that Lynch would

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make good his warranty. Whether it was so or not was a question for the jury, under suitable instructions from the court. The plaintiff was not, as a matter of law, entitled to the rulings asked for, and it is to be presumed that suitable instructions were given. *Exceptions overruled.*

THOMAS M. ROGERS & another *vs.* UNION STONE COMPANY.

Worcester. Oct. 5, 1882. — Jan. 8, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If an order for goods is addressed to a corporation, and is accepted by "A. B., treasurer," he being in fact the treasurer of the corporation, the acceptance is in form that of the corporation.

A. manufactured a machine on the order of B., on the agreement that B. should pay cash for it. C. had ordered the machine of B. When the machine was completed, B. was not able to pay cash, and it was agreed between A., B. and C. that B. should pay A. part cash, and give his promissory notes for the balance, secured by an order from B. on C. for goods, accepted by C. This was done, and, on the faith of the order, A. delivered the machine to C. on account of B. *Held*, that there was a good consideration between A. and C., and that A. could maintain an action against C. on the acceptance.

B. gave an order on C. in favor of A., as collateral security for promissory notes of B., which order was accepted by C. There was a sufficient consideration as between A. and C. Some of the notes were transferred by A. under an agreement that the order should be held by A. as collateral security for the payment of all the notes. A. then became bankrupt. *Held*, that, on the failure of B. to pay the notes, the assignee in bankruptcy of A. could maintain an action on the order for the benefit of the bankrupt estate and of the holders of the notes which had been transferred.

The purchaser of a *chose in action* from an assignee of a bankrupt estate may maintain an action upon it in the name of the assignee.

B. gave to A. an order on C. payable in goods, as collateral security for promissory notes of B. C. accepted the order, and there was a good consideration as between A. and C. The notes, except one, were not paid by B., and A. made a demand on C. to fill the order according to C.'s own construction of it, and in C.'s own way. C. refused, assigning no reason except that the order was not legal. No statement was made to C. of the amount due on the notes. *Held*, that C. was liable to A. on the order to the amount of the notes not paid.

CONTRACT, in two counts. The first count alleged that the plaintiffs were the assignees in bankruptcy of a corporation named the Wood and Light Machine Company; that, before the bankruptcy, Buchanan, Ware and Company made an order

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upon the defendant, a copy of which was annexed, directing it to deliver certain goods, therein specified, to the Wood and Light Machine Company; that the defendant duly accepted said order, and thereby became liable to deliver to said company said goods, to the value of two thousand dollars; and that the defendant, though often requested, had failed to deliver said goods to said company, or to the plaintiffs as their assignees in bankruptcy.

The second count, which was for the same cause of action, alleged that the defendant made an agreement in writing, a copy of which was annexed, agreeing to deliver to the Wood and Light Machine Company certain goods, therein specified, to the value of two thousand dollars; and that the defendant, though often requested, had refused to deliver said goods to said company, or to the plaintiffs as its assignees in bankruptcy.

The copy annexed to both counts was as follows: "Worcester, January 8, 1876. Union Stone Co., Boston, Mass. Please deliver Wood and Light Machine Company, or order, two thousand dollars in emery wheels and emery goods, hones, slips, &c. as per our order of October 20, 1875. Buchanan, Ware & Co."

Across the face of this order was written: "Two thousand dollars emery goods at our list prices. Accepted, January 8, 1876. Jno. F. Wood, Treas."

Answer: 1. A general denial. 2. That the order or agreement was never presented to, or demand made upon, the defendant, and that payment was never refused. 3. That the order and agreement were given as collateral security for the payment of certain notes, which had been fully paid and satisfied; and that said original claims were never possessed by the plaintiffs.

The plaintiffs were afterwards allowed to amend their declation by adding the following count:

"And the plaintiffs say that they are the assignees in bankruptcy of the Wood and Light Machine Company, as alleged in the preceding counts, and before the said corporation was adjudicated bankrupt, to wit, on or about January 8, 1876, in consideration that the said Wood and Light Machine Company would deliver to the defendant a certain lathe of great value, which the said Wood and Light Machine Company had theretofore

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manufactured for Buchanan, Ware and Company, and which said Buchanan, Ware and Company had agreed to pay cash for on delivery, and would receive in part payment therefor certain promissory notes of Buchanan, Ware and Company, the defendant accepted and delivered to the said Wood and Light Machine Company, the order, a copy whereof is annexed to the first count of the declaration, said order having been drawn in the presence of the defendant and of said Buchanan, Ware and Company and of the said Wood and Light Machine Company, and then and there accepted as aforesaid by the defendant; and thereupon the said Wood and Light Machine Company did deliver said lathe to the defendant, on the faith and credit of said order and acceptance, and received said order as collateral security for said notes, and said notes were not paid, but still remain unpaid; and thereupon, by the premises, the defendant promised to deliver to said Wood and Light Machine Company the goods mentioned in said order, yet the defendant, though often requested, refused and neglected, and still refuses and neglects, to deliver said goods to said Wood and Light Machine Company, or to the plaintiffs, to whom, upon the said assignment in bankruptcy, the said order and acceptance passed, and therefore a cause of action hath accrued to the plaintiffs to recover against the defendant the value of the goods described in said order."

The answer to this count contained a general denial, alleged that, if the defendant made the contract declared on, it was given to the plaintiff as collateral security for certain notes given by Buchanan, Ware and Company to the plaintiffs, and that the plaintiffs had discharged Buchanan, Ware and Company from said notes. The answer also alleged that no cause of action existed in behalf of the plaintiffs against the defendant on account of the matters sued on, and that the notes for which the contract was given had been paid.

After the former decision, reported 130 Mass. 585, the case was tried in the Superior Court, without a jury, before *Gardner*, J., who made a report of the case for the determination of this court, which, after stating that the pleadings were made part thereof, proceeded in substance as follows:

On January 12, 1876, the Wood and Light Machine Company filed a voluntary petition in bankruptcy, and the plaintiffs

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were appointed assignees of their estate. The following facts were agreed to, but the defendant contended that they were inadmissible under the pleadings:

On or about January 8, 1876, the Wood and Light Machine Company had completed a lathe which it had been manufacturing on account and on the order of Buchanan, Ware and Company, who had employed the Wood and Light Machine Company to manufacture it in consequence of an order which they had received from the defendant. Buchanan, Ware and Company had agreed to pay cash for said lathe; and, on January 8, Ware, of the firm of Buchanan, Ware and Company, Wood, the treasurer of the defendant, and Howland, the agent of the Wood and Light Machine Company, met in Worcester. At this interview Ware asked Howland to take the notes of Buchanan, Ware and Company for the lathe; Howland refused, but offered to take them if indorsed by the defendant. Wood objected that he had, as treasurer, no authority to indorse notes. Thereupon it was agreed between all the parties that Buchanan, Ware and Company should pay one thousand dollars in cash, and should give five promissory notes for the balance, and, to secure said notes, that Buchanan, Ware and Company should draw the order in suit, and the same should be accepted by the defendant, and delivered to the Wood and Light Machine Company as security for said notes. In pursuance of this agreement, Ware drew and signed the order, and Wood signed the acceptance thereof and took it with him to Boston, upon an understanding and agreement that it was to be delivered to the Wood and Light Machine Company with the $1000 cash. In the course of a day or two, Wood sent it, in pursuance of the agreement, to the Wood and Light Machine Company. This corporation delivered the lathe to the defendant on account of Buchanan, Ware and Company, and gave to them a receipted bill for the lathe. Wood sent in the same letter enclosing the order a check for $1000, which was paid by him for and on account of Buchanan, Ware and Company. The lathe was delivered to the defendant on the faith and credit of the money payment and the notes secured by the order; and it would not have been delivered if the order had not been given and accepted.

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The first note was paid by Buchanan, Ware and Company. Before the Wood and Light Machine Company filed their petition in bankruptcy, the second and third notes were indorsed by Wood and by the Wood and Light Machine Company, and transferred in payment, one to one Wellington, and the other to one Converse, of bills which they respectively had at that time against said company; and, at the time this action was begun, these notes were in the hands of said parties, and before the trial they handed them to the plaintiffs, but still owned the same. At the time said notes were transferred, the indorsees and holders thereof were informed that the notes were secured by said order, and it was agreed that the order should be held as security for said holders, and as security for the other notes. The other notes passed to the plaintiffs as a part of the assets of the Wood and Light Machine Company.

On June 25, 1877, a demand was made upon the defendant corporation, without any condition, to fill the order according to the defendant's own construction of it, and in its own way, and it refused, assigning no reason except that it was not legal.

In the fall of 1876, Wood asked Howland, who was then the authorized agent of the assignees and of the purchasers of the assets in carrying on the business, how many of said notes were paid and how much was due thereon, and Howland replied that he did not know. No evidence was offered that any statement was ever made to the defendant of the amount due on said notes, or how many had been paid.

Before this action was begun, the plaintiffs assigned and transferred all their interest in said notes, and all the assets of said bankrupt estate, to Joseph Pratt and others, who now own the same, but said notes were not indorsed by the plaintiffs. After this transfer of said assets, the latter carried on the same kind of business, in the name of the Wood and Light Machine Company, as that company had been previously engaged in; and Howland, acting as their agent, retained in his possession the two notes so transferred to them. The assignees have no interest in this action, but it is prosecuted for the benefit of the holders of said four notes.

The defendant asked the judge to rule that, upon the above facts, the plaintiffs could not recover, and, if they could recover,

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that they could only recover the amount due on the last two notes. The judge refused so to rule; but ruled that the plaintiffs could recover, and found for the plaintiffs for the amount due on said four notes, namely, $1105.88, and ordered judgment accordingly.

If the ruling was correct, the judgment was to stand; otherwise, such order and direction to be made as law and justice might require.

F. W. Griffin, (*F. T. Blackmer* with him,) for the defendant.

F. P. Goulding, for the plaintiffs.

FIELD, J. The order was addressed to the Union Stone Company, and was accepted by "Jno. F. Wood, Treas.," who was the treasurer of the company. In form this is an acceptance by the company, and the circumstances under which it was given show that it was intended to be the acceptance of the company. *Carpenter* v. *Farnsworth*, 106 Mass. 561. *Whitney* v. *Stow*, 111 Mass. 368.

The order was accepted in pursuance of an agreement between the Wood and Light Machine Company, Buchanan, Ware and Company, and the defendant, that the defendant should accept the order and deliver it to the Wood and Light Machine Company, and it was so delivered. This constituted a promise by the defendant directly to the Wood and Light Machine Company. The Wood and Light Machine Company parted with the possession of the lathe, for which Buchanan, Ware and Company had agreed to pay cash, and delivered it to the defendant "on account of Buchanan, Ware and Company," "on the faith and credit of the money payment and the notes secured by the order." This was a good consideration for the acceptance and delivery of the order, moving directly from the Wood and Light Machine Company, at the request of the defendant. These facts bring the case within the law as laid down in *Walker* v. *Sherman*, 11 Met. 170, and distinguish it from the case at bar as reported in 130 Mass. 584.

The order was delivered as collateral security for the payment of the notes of Buchanan, Ware and Company. At the time the Wood and Light Machine Company filed its petition in bankruptcy, that company held the order and three of the five notes given by Buchanan, Ware and Company. The remaining two

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notes the company had transferred to other persons, under an agreement that the order should be held as security for the payment of the notes transferred, as well as of the notes retained by the company. The bankrupts, therefore, at the time when the assignment in bankruptcy took effect, held the legal title to the order and had a beneficial interest in it, and that title passed to the assignees in bankruptcy, who, if the notes of Buchanan, Ware and Company were not paid, could in their own names have enforced the order for the benefit of the estate in bankruptcy, and of the holders of the transferred notes. U. S. Rev. Sts. §§ 5046, 5047. *Rhoades* v. *Blackiston*, 106 Mass. 334.

The assignees before the commencement of this action sold and assigned all their interest in the notes, and in the assets of the bankrupt estate, to Pratt and others, and the order has been held by Howland, the agent of Pratt and others, as collateral security for the payment of the notes transferred by the company before bankruptcy, as well as of the notes sold to Pratt and others by the assignees. The purchaser of a *chose in action* from an assignee in bankruptcy cannot bring suit in his own name, but may in the name of the assignee. *Leach* v. *Greene*, 116 Mass. 534.

By none of the transfers of the notes of Buchanan, Ware and Company has the defendant been discharged from its liability on the order, and the assignees are the proper party to bring an action at law upon it for the benefit of the persons who are equitably interested in the damages to be recovered.

As the order was delivered to the Wood and Light Machine Company directly by the defendant, upon a good consideration between these parties, the defendant was entitled to have the order delivered back to it, if the notes, the payment of which the order was given to secure, were all paid. One of the notes has been paid, but the order stands as security for the four notes remaining unpaid, and can be enforced against the defendant to the amount of those notes. The report finds that "a demand was made upon the defendant corporation, without any condition, to fill the order according to the defendant's own construction of it and in its own way, and it refused, assigning no reason except that it was not legal." This demand was made after the maturity of all the notes. After such a demand

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and refusal, the defendant cannot successfully defend against the action for damages in money on the ground that no statement was ever made to it "of the amount due on said notes, or how many had been paid." The refusal to perform the contract was absolute, and the reason given was such as to render it unnecessary for the plaintiffs to inform the defendant of the amount remaining unpaid upon the notes.

The rulings of the court were correct. *Judgment affirmed.*

HORACE M. HEDDEN *vs.* PETER ROBERTS.

Worcester. Oct. 5, 1882. — Jan. 8, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action for the price of goods sold, upon the issue whether the plaintiff sent a bill of the goods by mail to the defendant and the defendant received it, evidence is admissible that upon the envelope containing the bill was printed a request for a return of the letter to the post-office address of the plaintiff, if not called for in ten days, and that it was not returned to him.

The plaintiff declared upon an account annexed for the price of a monument. The answer set up that the contract was for a monument and two tablets to be made and erected in the defendant's cemetery lot; and that the plaintiff had not performed or offered to perform this contract. At the trial, the plaintiff denied that the contract included two tablets, and did not contend that he had furnished or offered to furnish the tablets, but offered evidence tending to show that the defendant had not selected the tablets, and had not designated the inscriptions to be put upon them; and also offered evidence of a general custom among manufacturers of monuments, that when a special contract is made for a monument and accompanying tablets to be set up in a cemetery lot, and when the contract includes tablets and a monument and the setting of the same, not to furnish the tablets until the purchaser has selected them and furnished the lettering for them." *Held*, that evidence of the custom offered was inadmissible.

In an action for the price of a monument, an acceptance of the monument by the defendant may be inferred from evidence that it has been allowed by him to remain in position on his lot for more than a year, without objection or request to remove it, and that he has since graded his lot and turfed it up to the sides of the monument.

CONTRACT, upon an account annexed, for the price of a monument. The answer set up, among other things, that the contract was for a monument and two tablets to be made and erected in the defendant's cemetery lot; and that the plaintiff had not

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performed or offered to perform this contract. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. Hopkins, for the defendant.

W. A. Gile, for the plaintiff.

FIELD, J. If it was material to the plaintiff's case to show that he had sent a "bill of the monument to the defendant," and that the defendant had received it, evidence that upon the envelope was printed a request for a return of the letter to the post-office address of the plaintiff, if not called for in ten days, and that the letter was not returned to him, was rightly admitted in connection with the evidence that the plaintiff sent the bill enclosed in this envelope by mail to the defendant. It was the duty of the officers of the postal service to return the letter to the address upon the envelope (the postage being prepaid) if it was not delivered to the person to whom it was addressed, and there is the same inference of fact that they would do their duty in this respect as in forwarding and delivering letters addressed to a merchant at his place of business. U. S. Rev. Sts. § 3939. *Huntley* v. *Whittier*, 105 Mass. 391.

Evidence was admitted "of a general custom among manufacturers of monuments, that when a special contract is made for a monument and accompanying tablets or markers to be set up in a cemetery lot, and when the contract includes tablets or markers and a monument and the setting of the same, not to furnish the tablets until the purchaser has selected them and furnished the lettering for them." At the trial, the plaintiff denied that the contract included two tablets, and he did not contend that he had furnished or offered to furnish the tablets; but he offered evidence tending to show that the defendant had not selected the tablets, and had not designated the inscriptions to be put upon them, and also evidence of the general custom above set forth. The purpose of this evidence on the part of the plaintiff must have been to show that, even if the contract was as the defendant contended, and if the plaintiff had not offered to furnish the tablets, still he was not in default.

If the contract, whatever it was, had been fully performed by the plaintiff, he could, under his declaration, maintain an action

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for the price. If the contract was entire for a monument and two tablets, and the defendant had received and accepted the monument, the plaintiff could maintain his action to recover what the monument was reasonably worth, although he refused or neglected to furnish the tablets, but the plaintiff's claim would be subject to reduction by the damages the defendant had suffered from the plaintiff's failure to fully perform his contract. *Bowker* v. *Hoyt*, 18 Pick. 555. *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63. Whether the plaintiff had failed to perform his contract was therefore, in any view, a material element in the case.

From the nature of the contract, if it included tablets, the plaintiff could not perhaps well be required to set up the tablets until he had been informed by the defendant of the inscriptions to be put upon them, and had cut them, but it would not be the duty of the defendant to designate the inscriptions until the plaintiff had informed him that he was ready to furnish the tablets. If the defendant had the right to select the tablets, it was not his duty to do so until he had been informed by the plaintiff that he was ready to furnish them. The plaintiff could not discharge himself from liability under the contract, except by performance or by a tender or an offer of performance. If he was prevented by the defendant from performing the contract, he must still show that he was ready and willing to perform it in order to entitle himself to the benefit of performance. If the custom put in evidence meant anything other than this, it meant that it was not the duty of the plaintiff to offer to furnish the tablets, or to give any notice to the defendant of a readiness or willingness to furnish them; but that it was the duty of the defendant first to offer to select them and to designate the inscriptions, and only by a neglect or refusal of the plaintiff after that to put on the inscriptions and set up the tablets could a failure to perform the contract be shown.

Usage is a matter of fact, and not of opinion, and evidence of usage cannot be received if it is opposed to the terms of a contract or to the principles of law. The general understanding of manufacturers of monuments and tablets, as to their rights and obligations under similar contracts, could not be received to vary the rights of these parties under this contract. The custom put

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in evidence, if it had any pertinency to the case, contradicted the rules of law applicable to the contract, and was inadmissible; and the exception to its admission must be sustained.

There was evidence that "the monument had been allowed by the defendant to remain in position on his lot from that time," that is, the time of its erection, "to the time of the trial, more than a year, without objection or request to remove it; and that the defendant had since graded his lot, and turfed it up to the sides of the monument." It was not the duty of the defendant to return the monument if he refused to accept it. But declining to accept it at the time it was erected, would not preclude him from afterward accepting it, and the fact that he allowed it to remain on his lot, in connection with the other evidence in the case, was evidence from which an acceptance might be inferred. The court was not required to rule upon the effect of the defendant's allowing the monument to remain, unconnected with the undisputed evidence that he had not requested the plaintiff to remove it, or with the evidence of the plaintiff "that the defendant had since graded his lot, and turfed it up to the sides of the monument." If the defendant desired fuller or more explicit instructions upon what constituted an acceptance or an appropriation of the monument to the defendant's use, he should have asked for them. The rulings of the court upon this part of the case were correct.* *Exceptions sustained.*

* The defendant asked the judge to instruct the jury, that, if the defendant declined to accept the monument at the time it was placed upon his lot, allowing it to remain there was not evidence of an appropriation by him so as to warrant a recovery for its value. The judge declined to give the instruction as requested, but instructed the jury that permitting the monument to remain on the lot was not of itself an acceptance or appropriation of it, nor conclusive evidence of such acceptance or appropriation, but that it was a fact which they had a right to consider, in connection with the other evidence in the case, as bearing upon the question whether the defendant had appropriated the monument to his own use as his property.

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ERNEST ST. ANDREW *vs.* MANCHAUG MANUFACTURING COMPANY.

Worcester. Oct. 5, 1882. — Jan. 8, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

At the trial of an action brought for the benefit of an assignee of the amount due and to become due the plaintiff for wages as a laborer in the employ of the defendant, a corporation, there was evidence that the defendant "had tenement houses to rent to its operatives, and also kept a store from which it sold goods to its operatives and others;" that, "when pay-days came, the defendant deducted from the amount of wages the plaintiff had earned during each month certain sums due it for rent of the defendant's tenement occupied by the plaintiff, and for goods sold to the plaintiff from the defendant's store," and paid the remainder to the assignee, who received it under a protest that he was entitled to the whole of the wages; and that "the retention of rent and store bills by the defendant from the wages of its operatives was the custom of the defendant's business for a long time," of which custom the assignee had notice before the assignment. *Held*, that this was not evidence that it was a part of the contract of employment that the plaintiff should be paid, either in whole or in part, for his labor in rent or goods; and that, after notice of the assignment, the defendant could not set off against the assignee's claim demands against the plaintiff not arising from the contract of employment.

CONTRACT, brought for the benefit of Julius D. Whipple and A. F. Jones, for a sum of money alleged to be due them from the defendant, under an assignment to them by the plaintiff of all claims and demands for money due and to become due for services as a laborer in the employ of the defendant from November 1, 1879, to November 1, 1880. Trial in the Superior Court, without a jury, before *Mason*, J., who found and ordered judgment for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. S. B. Hopkins, for the defendant.

C. G. Keyes, for the plaintiff.

FIELD, J. The principal question presented by these exceptions is, whether there was any evidence that, by the contract under which the plaintiff was employed, the defendant had the right to make payments "in rent or goods," or was under any obligation to make payments in that manner. No evidence appears that the plaintiff expressly agreed with the defendant that he would occupy one of its tenements, or buy goods at its store and pay therefor by his labor; or that he would receive payment

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for his labor, in whole or in part, in goods, or by occupying a tenement of the defendant; or that the defendant agreed, in consideration of the labor of the plaintiff, to let him a tenement or to sell him goods. The only evidence stated in the exceptions from which the court was asked to infer any such agreement was, that the defendant "had tenement houses to rent to its operatives, and also kept a store from which it sold goods to its operatives and others;" that, "when pay-days came, the defendant deducted from the amount of wages the plaintiff had earned during each month certain sums due it from the plaintiff for rent of the defendant's tenement occupied by the plaintiff, and for goods sold to the plaintiff from the defendant's store," and paid the remainder to the assignees for whose benefit this action was brought, who received it under a protest that they were entitled to the whole of the wages, and "that the retention of rent and store bills by the defendant from the wages of its operatives was the custom of the defendant's business for a long time," of which custom the assignees had notice before the assignment. All this is evidence of a usage of setting off mutual debts in making settlements, and is not evidence that it was a part of the contract of employment that the plaintiff should be paid, either in whole or in part, for his labor in rent or goods. It would have been no defence to an action brought by the plaintiff for wages, that he refused to occupy one of the tenements of the defendant or to buy goods at its store.

This was an assignment of all claims and demands for money due, or which should become due, for services as a laborer. As an assignment of money due, it was an assignment of an existing chose in action, and was subject to all the equities, including both matters in defence and in set-off, which existed between the assignor and the debtor at the time the debtor received notice of the assignment; but, after such notice, the debtor could not, as against the assignees, diminish the amount justly due at the time the notice was given, by any agreement with the assignor, or by payments to him, or by acquiring claims against him. As an assignment of money which should thereafter become due for services to be rendered as a laborer under a contract of employment existing at the time the assigment was made, it was valid; although, as the contract of employment apparently was for no

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definite time, the assignment was subject to all the rights the parties to the contract had to terminate it, or to change its terms at any time, as well after as before notice of the assignment. But there is no evidence that the contract of employment under which the plaintiff was working at the time he made the assignment was ever terminated, or was in any respect modified or changed. When money became due or payable to the plaintiff under this contract, the right to receive it passed by virtue of the assignment to the assignees, and demands accruing to the defendant against the assignor after notice of the assignment, not arising from the contract of employment, but independent of it in their origin, cannot be set off against the claim of the assignees. No error appears in the rulings of the court, and the *Exceptions are overruled.*

SAMUEL WINSLOW *vs.* JAMES L. PLIMPTON.

Worcester. Oct. 7, 1882. — Jan. 8, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A declaration alleged that the parties made a contract, whereby the plaintiff agreed to manufacture roller-skates for the defendant, for an indefinite time, to the extent of the facilities which the plaintiff then had to manufacture them at his factory; that, for that purpose, the defendant ordered the plaintiff to procure and keep on hand for the defendant at all times, during the continuance of the contract, at least two weeks' supply of stock and parts of skates, so that the plaintiff might be able to keep his said factory running at its full capacity at all times; that, pursuant to said contract, the plaintiff entered upon the manufacture of skates, and, in accordance with said order, procured and kept at all times, during said contract, at his factory, for the purpose of manufacturing skates for the defendant, a large quantity of stock and parts of roller-skates; that, on a day named, while the plaintiff was manufacturing skates under this contract, and had on hand two weeks' supply of stock and parts of skates, the defendant ordered him to desist from the manufacture of skates and to manufacture no more for him; that the value of the stock and parts of skates on hand was a sum stated; that the defendant directed him not to use said stock and parts of skates in the manufacture of roller-skates, and that he had no right to use the same for any purpose; that the plaintiff asked the defendant to take said stock and parts of skates and pay him therefor, which the defendant refused to do; and that the plaintiff had the same, but they were of no use or value to him, whereby he had sustained damage in a sum named. At the trial, the evidence tended to show that the plaintiff agreed to manufacture at his

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factory for the defendant, until further notice, as many skates as his facilities there would enable him to manufacture; that the defendant agreed to take all the skates so manufactured until further notice, and to pay the plaintiff an agreed price therefor; that the plaintiff entered upon the manufacture of skates under this contract, and, while so engaged, the defendant requested him to keep on hand always at least two weeks' supply of stock, that he might manufacture skates faster; that the plaintiff complied with this request; that afterwards, while the plaintiff was engaged in manufacturing skates, the defendant, without any warning, gave him notice to immediately discontinue manufacturing skates, and forbade him to manufacture into skates the stock on hand, and refused to take and pay for said stock; and that the plaintiff could not manufacture into skates said stock without the defendant's permission, because the manufacture of the skates was protected by letters-patent owned by him, whereby the stock on hand, being of great value, became of little or no value to the plaintiff. *Held*, that the evidence did not support the declaration.

CONTRACT. At the trial in the Superior Court, before *Mason*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

H. L. Parker & S. H. Tyng, for the defendant.

F. T. Blackmer, for the plaintiff.

FIELD, J. It appears in the exceptions, that, "at the close of the evidence, the defendant asked the court to rule that the first count of the amended declaration did not set forth a cause of action, and that, upon the evidence as above stated, he could not maintain his action upon either count of his declaration, but the court declined so to rule, but ruled that there was evidence for the jury." The court had previously ruled "that the plaintiff could recover only under his amended declaration." The defendant's request for a ruling must therefore mean that the plaintiff could not maintain his action upon either count of the amended declaration. That declaration contains two counts, of which the last is an ordinary count upon an account annexed.

It is difficult to determine with certainty what cause of action the pleader intended to set out in the first count. That count is, in substance, that the parties made a contract together, whereby the plaintiff agreed to manufacture roller skates for the defendant, for an indefinite time, "to the extent of the facilities which the plaintiff then had to manufacture them at his factory," and "for that purpose" the defendant ordered the plaintiff to procure and keep on hand for the defendant at all times, during the continuance of the contract, at least two weeks' supply of stock and parts of skates, "so that the plaintiff might be able to keep

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his said factory running at its full capacity at all times;" that, pursuant to said contract, the plaintiff entered upon the manufacture of skates, and, in accordance with said order, "procured and kept at all times, during said contract, at said factory, for the defendant, for the purpose of manufacturing skates for the defendant, as aforesaid, a large quantity of stock and parts of said roller skates, as the defendant ordered and directed him to do;" that, on May 27, 1876, while the plaintiff was manufacturing skates under this contract and had on hand two weeks' supply of stock and parts of skates procured for the defendant, as aforesaid, the defendant ordered him "to desist from the manufacture of skates, as aforesaid, and to manufacture no more for him, the defendant;" that the value of the stock and parts of skates on hand were as stated in the account annexed; "that the defendant directed him not to use said stock and parts of skates in the manufacture of roller skates, and that he had no right to use the same for any purpose, and the plaintiff asked the defendant to take the said stock and parts of skates and pay him therefor, which the defendant refused to do; that the plaintiff has the same, but they are of no use to him nor of any value to him. Wherefore the plaintiff says that, by the neglect and refusal of the defendant to take and pay for said stock and skates, so ordered by him as aforesaid, and which he agreed to take and pay for, as aforesaid, the plaintiff suffered great damage, to wit, in the sum of thirty-eight hundred and thirty-eight dollars and sixty-nine cents." The account annexed contains items and values, the total of which is $3838.69.

The construction we put upon this count is, that, if it alleges anything with the certainty required in declarations, it alleges that the plaintiff procured the stock and parts of skates for the defendant at his request, and either that the defendant agreed to take them from the plaintiff and pay for them, or that he was under a legal obligation so to do if he ordered the plaintiff to discontinue manufacturing skates, and that this the defendant has refused to do.

If the stock and parts of skates on hand were purchased or procured by the plaintiff for the defendant at his request, the plaintiff can maintain his action against the defendant, under the pleadings, if the defendant refused to accept and pay for them,

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or if they have been applied to the defendant's use; but the evidence stated does not tend to prove such a cause of action.

There was evidence tending to prove that the plaintiff agreed to manufacture at his factory for the defendant, "until further notice," as many skates as his facilities there would enable him to manufacture; that the defendant agreed to take all the skates so manufactured "until further notice," and to pay the plaintiff an agreed price therefor; that the plaintiff entered upon the manufacture of skates under this contract, and, while so engaged, the defendant requested him to keep on hand always at least two weeks' supply of stock, that he might manufacture skates faster; that the plaintiff complied with this request; that thereafterwards, while the plaintiff was engaged in manufacturing skates, the defendant, without any warning, gave him notice to immediately discontinue manufacturing skates, and forbade him to manufacture into skates the stock on hand, and refused to take and pay for the stock on hand; and that the plaintiff could not manufacture into skates the stock on hand without the permission of the defendant, because the manufacture of the skates was protected by letters patent which the defendant owned; whereby the stock on hand, being of great value, became of little or no value to the plaintiff.

There was no evidence that the defendant agreed to receive from the plaintiff the stock and parts of skates on hand and to pay him therefor, or that the plaintiff procured the stock and parts of skates on hand for the defendant in any such sense that they became the defendant's property, or were held by the plaintiff as the property of the defendant. The evidence tended to prove that the plaintiff procured the stock and parts of skates to enable himself to furnish materials for and to manufacture skates for the defendant under his contract, and that the defendant was to receive and pay for the skates when they were manufactured, but not for the materials for skates before they were manufactured into skates. There was no evidence from which there could be inferred any legal obligation on the part of the defendant specifically to take the stock and parts of skates on hand, and to pay the plaintiff therefor.

Whether, on the facts which this evidence tended to prove, it would not have been the duty of the defendant to have given

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the plaintiff two weeks' notice, or reasonable notice, of an intention to determine the contract, before he gave a peremptory order to stop manufacturing, and whether the defendant would not be liable to the plaintiff in damages for the non-performance or breach of that duty, need not now be considered. Such is not the cause of action set forth in either count of the amended declaration. Apparently the plaintiff intended to set out such a cause of action in the first count of his original declaration, although it did not allege that the stock on hand had been procured at the express request of the defendant. The court ruled that the plaintiff could recover only under the amended declaration; to this ruling no exception was taken, and the correctness of it is not before us. As no evidence is stated which tends to prove either count of the amended declaration, the

Exceptions are sustained.

WILLIAM B. ORCUTT *vs.* JOHN B. MOORE.

Worcester. Oct. 5, 1881; Oct. 5, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If the owner of a farm leases it to a person for a year, under an oral agreement, by which the lessee is to "carry on the farm at the halves," and is to leave at the end of the term as much hay as he found there at the beginning, and the lessor does not occupy the farm during the term, it cannot be held, as matter of law, that the lessor has, during the year, such a potential interest in the crops as to enable him to mortgage them.

The word "date" in the St. of 1874, c. 111, relating to the recording of mortgages of personal property, is not limited to the date stated in the *in testimonium* clause, but refers to the day of the delivery of the deed.

TORT for the conversion of personal property, attached by the defendant, a deputy sheriff, as the property of Franklin W. Orcutt and Abigail Orcutt.

At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

The case was argued at the bar in October 1881, by *S. Hoar*, for the defendant, and by *F. P. Goulding*, for the plaintiff; and was reargued in October 1882, by the same counsel.

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MORTON, C. J. Franklin W. Orcutt and Abigail Orcutt, being the owners of a farm in Concord, leased it "to one Bailey for a year, under an agreement by which said Bailey was to carry on the farm at the halves, and was to leave, on December 18, 1877, as much hay as he found there when he took the farm, December 18, 1876."

In October 1877, the said Orcutts made a mortgage to the plaintiff of "all the hay and fodder in my barn, one undivided half of all the grain, and one undivided half of all the beans." After the mortgage was made, and before any division had been made by Bailey, the defendant, who is a deputy sheriff, attached the hay and fodder in the barn on the farm, as the property of the said Franklin W. and Abigail Orcutt. At the end of the year, on December 18, 1877, Bailey, with the consent of the defendant, divided the hay and fodder, took away his portion, leaving the balance in the barn, which the defendant afterwards sold. The mortgagors did not occupy the farm during the year, and never had possession of the hay and fodder, except so far as the possession of Bailey was a constructive possession by them.

It is clear that the mortgage conveyed nothing to the plaintiff, unless the mortgagors, at the time it was made, had a present potential interest in the property described in it. *Low* v. *Pew*, 108 Mass. 347, and cases cited. *Thrall* v. *Hill*, 110 Mass. 328. The case therefore presents the question, whether it can be held, as matter of law, upon the facts stated in the bill of exceptions, that the mortgagors had any interest or title in the crops raised upon the farm leased to Bailey.

It is said in *Warner* v. *Abbey*, 112 Mass. 355: "In construing contracts for the cultivation of land at halves, it is impossible to lay down a general rule, applicable to all cases; because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties. . . . . In some cases, the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease with rent payable in kind; in other cases, he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is

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entitled to the joint possession of the crops, or the possession of the one is the possession of the other, until division; or he may retain the sole possession of the land, and the other party may have merely the right to perform the labor and receive half the crops as compensation; or the two parties may become tenants in common of the growing crops, while no tenancy in common, as such, exists in the land." The decisions upon the subject in England, in this State, and in the other States of this country, are numerous and conflicting. We think the only general rule deducible from them is, that, as intimated in *Warner* v. *Abbey*, each case must depend upon the special terms of the contract, and the subject matter and the surrounding circumstances, in the light of which it is to be interpreted, the question being, as in the case of other contracts, what was the intention of the parties.

In *Walker* v. *Fitts*, 24 Pick. 191, the plaintiff leased to the defendant, by a lease under seal, the farm on which the plaintiff lived; the conditions of the lease were, that each party was to furnish one half of the necessary seed, Fitts was to sow and plant the tillage land and to deliver to Walker one equal half of the crops of every kind, properly and seasonably secured in his house, cellar and barn; the corn to be divided in the ear, and other grain to be threshed and then divided; and Fitts was to have the use of the east scaffold in the barn to put his grain upon. They were to occupy the land jointly. The lease shows in the clearest manner their intention that the specific products were to be divided between them and that they should be jointly owners of the crops; and the court held that they were tenants in common.

In *Delaney* v. *Root*, 99 Mass. 546, the plaintiff made an oral contract with the defendant to farm a lot of land upon shares, it being agreed that each was to furnish one half of the seed and manure; that the plaintiff should do the hand labor and the defendant the team work; and that the plaintiff should harvest the crops, which were to be divided equally between them. The action was for the conversion of the whole crop by the defendant. The Superior Court having ruled that it could not be maintained, this court held that the ruling was erroneous, Mr. Justice Hoar, in the opinion, saying that the parties were tenants in common of the crops. Here was a joint occupation

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of the land, labor bestowed by each upon the cultivation, and a clear intention that the crop in kind was to be divided.

In *Cornell* v. *Dean*, 105 Mass. 435, the plaintiff hired a farm of the owners, from year to year, on shares, retaining one half of the proceeds of the place, giving the owners the other half, and having the exclusive occupation of the farm. The action being to recover pay for pasturing the defendant's cattle upon the farm, it was held that the Superior Court rightly refused to rule that the owners were tenants in common with the plaintiff of the crops and proceeds, and that the plaintiff could not maintain the action in his own name.

In *Warner* v. *Abbey*, above cited, the plaintiff agreed by parol with the defendant, the owner of land, to cultivate it on shares. The precise terms of agreement being in dispute, it was held that it was for the jury to determine whether they were tenants in common, and a verdict finding that they were not such tenants was upheld.

In *Darling* v. *Kelly*, 113 Mass. 29, one Chilson let land to the plaintiff on the terms that Chilson was to manure and plough it, that the plaintiff was to find seed, and to plant, cultivate and harvest the crops, that the crops, after they were harvested, were to be divided upon the land, and one half taken by Chilson for his own use and the other half taken by him to the house of the plaintiff. It was held that, if the jury found that the plaintiff was entitled to the exclusive possession of the land after it was ploughed and manured, he could maintain an action of trespass *quare clausum* against a stranger, who entered, and harvested and took away the crops, though he justified under a license from Chilson.

We think the result of the authorities is, that each case must depend on its own facts and circumstances, and must be governed by the intention of the parties manifested in their contract. Generally, where the contract is oral and not capable of being exactly proved, it must be left to the jury to determine what the contract is.

In the case at bar, the bill of exceptions does not disclose the precise terms of the agreement between the mortgagors and Bailey. It states, as the result of the oral agreement, that Bailey was to "carry on the farm at the halves," and was to

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leave at the end of his term as much hay as he found there at the beginning. It is not stated whether this hay was to be hay raised on the farm, or other hay of equal quality; whether the crops were to be divided in kind, or whether Bailey could sell them, accounting for one half of the proceeds; and the evidence bearing on these questions is not stated. It is stated that the mortgagors did not occupy the farm, which is strong evidence that Bailey's occupation was intended to be exclusive.

The learned justice who presided in the Superior Court seems to have held that it is the general rule, that, under a contract to cultivate land on shares, the parties are, as matter of law, tenants in common of the crops. We are of opinion that this was erroneous. We do not decide that the parties to the contract were not tenants in common; but that, upon the case as presented to us, it cannot be held, as matter of law, that they were such tenants. It is for the jury to say what the contract was, and, under proper instructions, whether it made them owners in common of the growing crops.

The plaintiff contends that, whatever were the particular provisions of the lease, a lessor of land let on shares has such potential interest in the products before division, that he may sell or mortgage them. This presents the same question in another form. Whether he has any potential interest depends on the contract, which must be ascertained by the jury. If the contract is, that the specific products are to belong to the parties jointly, and are to be divided, he has such potential interest; if the contract is, that the lessee is to pay, as rent, a share of the crops or its equivalent, he would have no interest in any specific property so that he could sell it, though he has a claim for rent payable at the stipulated time.

The other objection to the mortgage, that it was void as against creditors, because not recorded within fifteen days after the date in the *in testimonium* clause, it being recorded on the day of its delivery, cannot be sustained. This precise point was decided in *Shaughnessey* v. *Lewis*, 130 Mass. 355, and we see no reason to overrule that decision.* *Exceptions sustained.*

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* By the St. of 1883, *c.* 73, § 1, "every mortgage of personal property shall be recorded within fifteen days from the date written in such mortgage, and

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NEW YORK AND NEW ENGLAND RAILROAD COMPANY *vs.* THOMAS SANDERS & another.

Worcester. Oct. 3, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A carrier, having a lien for freight upon an entire cargo of coal, delivered a portion of it, on the order of the consignee, to a person who had purchased the whole cargo from the consignee. Subsequently, the carrier, on the arrival of the remainder of the coal, notified the purchaser that he claimed a lien on the remainder for the freight of the entire cargo, and ordered him not to disturb or unload it. The purchaser, without right, appropriated the remainder of the coal to his own use. *Held*, that the fact of such taking did not, of itself, as matter of law, import a promise on the part of the purchaser to pay to the carrier the freight of the entire cargo.

MORTON, C. J. The material facts in this case are as follows: The firm of William Edwards's Sons bought a cargo of coal in New Jersey, which was shipped by water to Norwich, consigned to the order of the seller. At Norwich, the plaintiff received it and paid the freight, and billed the coal to said Edwards's Sons at Sandersdale. Before any of the coal arrived at Sandersdale, Edwards's Sons sold it to the defendants, and directed the plaintiff to deliver it to them. The plaintiff accordingly delivered to the defendants, as it arrived, all of the coal except nine car loads, without any demand for the freight. Before the nine car loads arrived at Sandersdale, Edwards's Sons failed, and the plaintiff then notified in writing the defendants "not to disturb or unload from the cars any part of the coal consigned to William Edwards's Sons, as the freight and charges on the same are unpaid."

Afterwards, on the same day, said nine cars of coal arrived, and the plaintiff placed them on the side track running by the defendants' coal sheds, where it had been the custom to leave cars containing coal for the defendants, and the defendants, without

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when such a mortgage is required to be recorded in two different places, and is recorded in one of such places within said fifteen days, it may be recorded in the other within ten days from the date of the first record." And by § 2, "until a mortgage of personal property has been recorded as provided in the preceding section, it shall not be valid against any person other than the parties thereto, unless the mortgaged property is delivered to and retained by the mortgagee; and any record of a mortgage made subsequently to the times limited in said section shall be void and of no effect."

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any authority from the plaintiff, unloaded the coal into their sheds and used it. The plaintiff did not contend, before the defendants took the nine car loads of coal, that the defendants were personally liable for the freight upon it, and the defendants did not understand or believe that the plaintiff looked to them for said freight; but they were notified and understood that the plaintiff claimed a lien upon the undelivered coal for the whole freight and the advances upon the whole cargo, and did not intend to deliver it unless such freight and advances were paid.

The declaration has three counts. The first two may be treated as one, being the same in substance. They are counts in contract, alleging a promise of the defendants to pay the freight and charges upon the whole cargo. The third is a count in tort for the conversion of the nine car loads.

At the trial, it was admitted that the plaintiff was entitled to recover on the third count; and the only question was whether, on the foregoing facts, it could recover on the counts in contract. The plaintiff asked the court to rule that, "if the defendants, being the owners of said coal subject to the lien, took the coal, having notice that the plaintiff claimed a lien on it for the whole freight and advances, and did not intend to deliver it to the defendants unless they paid such freight and advances, a promise to pay such freight and charges would be implied, and the plaintiff is entitled to recover on his counts in contract." The court refused this ruling, and, the case being tried without a jury, found for the plaintiff on the count in tort for the value of the nine car loads.

The only question before us is whether the Superior Court was justified in refusing this ruling. In other words, the question is whether the defendants, if they knew that the plaintiff claimed a lien upon the coal for the whole freight, and did not intend to deliver it to the defendants unless they paid such freight, are conclusively presumed, as matter of law, to have promised to pay such freight from the mere fact of taking the coal. It is not contended that there was any express promise to support the counts in contract. The plaintiff contracted with and looked to said Edwards's Sons for the payment of the freight. It is not contended that the defendants, when they took the coal, were under any obligation to pay the freight. We are

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unable to see how, from the fact of the taking, an implied assumpsit arose. There was no privity of contract shown between the plaintiff and the defendants. The taking of the coal may be evidence of a promise to pay the freight, but the mere fact of taking without right does not in law import such promise.

The plaintiff contends that the defendants cannot be heard to say that they merely intended to convert the property, in violation of the plaintiff's rights. But we know of no principle of estoppel which prevents them from setting up the truth, though it shows their own wrongdoing. The same argument would apply whenever a man obtains property of another by theft, or by any other tort, and would break down the distinction between actions of contract and of tort. There is no reason for adopting the violent fiction that the man who thus obtains property promises to pay for it, because in the cases supposed, as in the case at bar, the rights of the owner are fully protected by recovering in an action of tort the full value of his property. *Ladd* v. *Rogers*, 11 Allen, 209. *Hills* v. *Snell*, 104 Mass. 173.

The plaintiff relies upon the case of *New Haven & Northampton Co.* v. *Campbell*, 128 Mass. 104. The circumstances of that case and the relations existing between the parties were materially different from those existing in the case at bar; and further, upon a careful examination of that case, it will be seen that the question whether, under the circumstances there existing, the law implied a contract by the defendant to pay the freight sought to be recovered, was not raised or adjudicated. The question before the court was whether in such a case a count in contract could be joined with a count in tort. In discussing this question, the court says, that if the defendant took the flour "with the knowledge that the plaintiff claimed a lien and looked to him for the payment of the freight and charges, a promise to pay would be implied." It would perhaps have been more accurate to have said that "a promise to pay might be implied." It was not the purpose of the opinion to state that, under the facts of that case, a promise to pay would, as matter of law, be implied. That question was not raised or discussed.

Judgment on the finding.

F. P. Goulding, for the plaintiff.

A. J. Bartholomew & F. T. Blackmer, for the defendant.

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PENN MUTUAL LIFE INSURANCE COMPANY *vs.* ELLERY B. CRANE.

Worcester. Oct. 5, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action upon a promissory note given to an insurance company in payment of a premium for a policy of insurance, evidence is admissible that the defendant was induced to make the note by the representations of the plaintiff's agent that certain persons named and known to the defendant were to be members of a local board of directors to be organized for the management of the plaintiff's affairs; and that such representations were false and fraudulent.

If a contract is sought to be avoided on the ground that it was induced by false and fraudulent representations, the question of the materiality of the representations is for the court, and not for the jury.

No exception lies to the admission of evidence which is competent for any purpose, if the excepting party does not ask for an instruction limiting its effect.

In an action on a premium note given to a life insurance company, it appeared that the company gave a written receipt for the note, by which it agreed to return the payment if a "local board" was not organized by the company. *Held*, that evidence was admissible, in defence, of false and fraudulent representations as to who should constitute this board and their qualifications.

A question not raised in the court below is not open upon a bill of exceptions.

If a negotiable promissory note is given, in payment of a premium for a policy of insurance, to an insurance company, which gives to the maker of the note a receipt acknowledging such payment, and agreeing to return the "payment" if the company does not do a certain act, the maker of the note is not obliged, if the company fails to do the act mentioned, to pay the note, and then seek his remedy on the receipt, but may avail himself of the fact of such failure in defence to an action on the note.

DEVENS, J. This is an action to recover the amount of a promissory note made by the defendant, and payable to the order of the plaintiff. The answer sets up two defences: First, that the delivery of the note was conditional only; and that it was to be returned in case the local board of directors for the management of the affairs of this company should not be organized, which local board was to be composed of twenty members of the company residing in the county of Worcester, insured in the plaintiff company in the sum of $10,000 each, and including certain persons named. Second, that false representations, among others that Edward P. Pevey, Emerson P. Knight and Charles B. Pratt would become and had agreed to become members of the local board of directors, were fraudulently and falsely made to the defendant by the plaintiff's agent to induce him to become

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a member of this board; that he was induced to give his note and accept a policy of insurance in the company under the promise that his note should be returned in case said local board should not be organized. The answer further avers, that when the representations that Pevey, Knight and Pratt had been secured as members of the local board, or had agreed to become such, were discovered by him to have been fraudulently made, he thereupon offered to give up the policy issued to him, and demanded the return of his note, which had been obtained from him by such false and fraudulent representations.

Upon giving the note in suit, on November 20, the defendant had received from the plaintiff a receipt of the same date for the payment of the premium for a policy to be issued by the plaintiff; and it was added, "This payment will be returned by the undersigned if the policy should not be issued or local board of directors organized by the company." At some time thereafter, apparently upon November 23, the defendant received a policy, and gave an acknowledgment of a loan from the company of $115.54, being a part of the premium, and declared to be a lien upon his policy. Afterwards, on December 12, 1880, according to the testimony on behalf of the plaintiff, the defendant signed an agreement preparatory to the organization of the proposed "local board."

Upon the offer of the evidence on behalf of the defendant, after the plaintiff had proved the note, the presiding justice, against the exception of the plaintiff, ruled that representations made to the defendant that certain persons known to him had agreed to become members of the local board of directors, and had already been secured as such, were such material representations as, if fraudulently made, and relied on by the defendant as an inducement to the making of the note, would constitute a defence under so much of the answer as contained an allegation of fraud; and admitted evidence to show this. This was correct. As the scheme proposed to the defendant was, that, having himself taken a policy of insurance in the plaintiff company, he should be associated with others in a local board of directors who were to have charge of the plaintiff's investments in Worcester county, and to be interested in the business of the company to a certain extent, it was certainly important for the

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defendant to ascertain who were to be associated with him in this enterprise. Knowledge upon this subject might make the entire difference with him whether he would embark in it by giving his note and taking out his policy. If it were fraudulently represented that certain persons had agreed to compose a part of this board, with whom for any reason, whether personal acquaintance, a high opinion of their character, credit or capacity, he was willing to be associated, and he had consented to such association, it would be unjust that he should, by such an agreement, be compelled to associate himself with other and different persons. If induced to give his note upon such fraudulent representation, as a portion of his contribution to the enterprise itself, or to the company with which it was connected, it would afford him a good ground of defence thereto while in the hands of him who had thus obtained it.

The contention of the plaintiff is, that this ruling took from the jury the right to say whether a material fraud had been committed on the part of the plaintiff, by limiting its decision simply to the inquiry whether these representations had been falsely and fraudulently made, so that the defendant had been induced thereby to give the note in suit. But it was not for the jury to determine what was the responsibility incurred by the plaintiff, if its representations were fraudulent and false, nor what was their bearing upon the contract. The construction of an oral as well as of a written contract is for the court, which is to determine, when there is no question as to its terms, what is its legal effect upon the duties and liabilities of the parties. Its interpretation and construction involve the determination of the rights and liabilities which it creates. *Short* v. *Woodward*, 13 Gray, 86. *Pratt* v. *Langdon*, 12 Allen, 544. *Globe Works* v. *Wright*, 106 Mass. 207.

The plaintiff contends, on the authority of *Lindenau* v. *Desborough*, 8 B. & C. 586, and *Huguenin* v. *Rayley*, 6 Taunt. 186, that the question whether the fraud was material or otherwise was a question of fact for the jury. This is a misapplication of these and kindred cases in the law of insurance, where it has been held that whether facts concealed or misrepresented increased the risk assumed by the insurer was to be determined by the jury. In such cases, it is always determined by the court,

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upon consideration of the contract, what is the character of the concealment or misrepresentation of facts which will invalidate the contract, and for the jury only to ascertain whether, within the definition thus given, there has been a material concealment or misrepresentation of them. In the case at bar, it was for the jury to decide whether the false and fraudulent statements alleged were made, and for the court to determine their effect upon the contract. Evidence was therefore properly admitted to prove these representations to have been made by the plaintiff's agents, and also that they were false and fraudulent.

The principal testimony on this subject came from the defendant himself and his clerk. As recited, much of this evidence does not appear to have been of importance for this purpose, but the plaintiff made no request for an instruction to the jury on most of these conversations, nor did he request that any parts thereof should be struck out as immaterial. To some portions of this evidence he did make specific objections, which we will hereafter consider. But he is not now entitled, except as he thus specifically objected, to any but the general exception made by him which we have already discussed. If after the court had ruled that the alleged fraudulent representations might be proved to have been made, he had wished to object to the mode or to the evidence by which this was sought to be done, he should have called particular attention to it by an objection made at the time. Much goes into the testimony at every trial which is immaterial, and unless a party in some form objects or excepts thereto, the presiding judge has a right to believe that it is not thought of sufficient importance to require notice. No attempt was made to separate the evidence offered at the trial, so as to confine it, or any part of it, to one of the two issues which the jury had before it. If, therefore, admissible upon either issue, it was properly admitted, and we must presume that the just and appropriate weight was given to it.

The plaintiff concedes that evidence was admissible so far as was necessary to determine who were "the local directors" referred to in its receipt. Even if the contract contained in the receipt is to be regarded as embracing the result of all former negotiations between the parties, and thus not to be controlled

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by parol evidence, (*Stackpole* v. *Arnold*, 11 Mass. 27, *Finney* v. *Bedford Ins. Co.* 8 Met. 348,) it was competent to show fraudulent statements by which the defendant was induced to make the contract. The evidence that the defendant was unduly solicited, and persistently refused to sign the application for insurance until he was persuaded by the agent employed by the plaintiff, was directly connected with, and a part of the history of, his application, which was signed by him with a statement who he understood the local board of directors would be. It had a tendency to show that only upon that understanding did he enter upon the contract.

The evidence from the defendant's clerk, that the note would be returned if not all right before organization, was a part of the conversations testified to as being always substantially the same, that the local board was to consist of twenty members, each insured for $10,000, &c. It was not introduced to prove any bargain then made, but to define or aid in defining what was the local board referred to in the written receipt. In the same conversation, the witness testified that the names of Pevey and Knight were mentioned as of the directors, and thus supported the theory of the defendant that it had been promised to him that they were to be directors.

The plaintiff further urges, that evidence of the dealings with other parties which the plaintiff had, by which they received policies of insurance upon a less premium than appeared by their policies, and less than the established rates of the company for persons of their age taking policies of the same kind, was inadmissible, upon the ground that its dealings with other persons could not affect the rights of the parties to this suit. As appears by the bill of exceptions, "both parties introduced evidence, without objection, of the representations and statements of the plaintiff's agent relating to the proposed 'local board of directors,' for the purpose of aiding in the interpretation of that expression" in the receipt given by the plaintiff. There was evidence from which the defendant was entitled to claim that to constitute said local board it must have twenty members, each of whom held a policy of $10,000 in the plaintiff company, upon his own life or the life of another, and each of whom paid for it the established rates of the company for persons of his age

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taking policies of the same kind. As the individuals who the defendant offered to show had received policies at less than the established rates were claimed by the plaintiff to be members of the local board, evidence of such dealing of the plaintiff with them was important in showing that no such local board had existed or been organized as the defendant had been promised, and that he was therefore entitled to a return of his note.

The plaintiff contends that, by giving the loan note as heretofore stated, by retaining his policy after the second meeting of that which the plaintiff claims to be the local board, and by acting so far as he did with such board, the defendant waived the fraud of which he now complains. No such point as this was raised at the trial, and it cannot be presented here. As full instructions beside those reported were given, we have no reason to doubt that, if any claim was there made of a waiver by the defendant of any fraud which had been practised upon him, it was properly submitted to the jury.

The plaintiff also asked the following instruction: "The receipt acknowledging payment and the note being negotiable, the contract does not call for a return of the note, as set up in the defendant's answer, but merely gives the defendant a remedy on his contract, if the terms are not fulfilled by the plaintiff." This instruction was properly refused. There had been no payment by the defendant, except by the delivery of the promissory note in suit. In order that the plaintiff should be entitled to collect the promissory note, it was necessary that it should organize the local board of directors, whatever that may have been agreed to be. The note sued on, the loan note and the receipt were all one transaction. Their validity depended upon the existence of this organization. To prove that a note was delivered upon a condition, and that this has not been complied with, is not to contradict its terms. The agreement to return the "payment," contained in the receipt, is an agreement to return the note, unless the condition is complied with upon which its vitality depends. A written paper, which is not to take effect except upon a condition yet to be performed, is not a binding contract. *Faunce* v. *State Assur. Co.* 101 Mass. 279. *Watkins* v. *Bowers*, 119 Mass. 383. *Pym* v. *Campbell*, 6 El. & Bl. 370. *Sweet* v. *Stevens*, 7 R. I. 375.

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Nor is it important, as between the promisor and the payee, that the instrument delivered upon any condition essential to its validity is a negotiable instrument. As between them, it is without effect until this be performed. *Bell* v. *Ingestre*, 12 Q. B. 317. *Benton* v. *Martin*, 52 N. Y. 570. The defendant was not therefore obliged to pay the note, and then seek his remedy upon the receipt. *Exceptions overruled.*

J. Hopkins, for the plaintiff.

W. S. B. Hopkins & D. Manning, Jr., for the defendant.

ADIN THAYER, Judge of Probate, *vs.* JOHN FINNEGAN.

Worcester. Oct. 6, 1880; Oct. 19, 1882. — Jan. 10, 1883. COLBURN & HOLMES, JJ., absent.

A testatrix appointed her eldest son executor of her will, and gave to him all her property, real and personal, he to pay all her debts and also to pay the school and college expenses of her younger son, and made no other provision for the younger son. Her personal property amounted to $20, and her real estate to $1500. *Held*, that the legacy to the younger son was a charge upon the real estate.

If the payment of a legacy is charged upon land devised to a person who is also appointed executor of the will, and the legatee joins in a mortgage of the land given by the devisee to secure a sum of money borrowed for the latter's personal use, and the mortgagee afterwards sells the land under a power contained in his mortgage and applies the proceeds of the sale to the payment of the mortgage debt, the legatee loses his right to proceed against the land to enforce payment of his legacy, and an action therefor cannot be maintained for his benefit against a surety on the executor's bond.

CONTRACT against a surety upon a bond, dated June 27, 1876, given by Thomas C. Coleman as executor of the will of Mary Coleman, in the form prescribed in the Gen. Sts. *c.* 93, § 2. The case was submitted to the judgment of this court, upon an agreed statement of facts, in substance as follows:

The will contained the following clauses: First. I constitute my son Thomas C. Coleman to be the executor of this my last will and testament. Second. I give and bequeath to said Thomas C. Coleman all my real and personal property of which I shall die seised and possessed, to him and his heirs forever, said Thomas C. to pay all the debts then outstanding at my decease,

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and also to pay the school expenses of my son John F. Coleman until through college, provided said John continues to the end of the proposed collegiate course, and so long as he continues at college." The testatrix left personal property amounting to $20, and real estate appraised at $1500.

This action is brought for the benefit of John F. Coleman, whose school and college expenses exceeded the sum of $365, which amount alone has been paid by the executor. There were more than sufficient assets, real and personal, to pay the sum of $365, together with the debts, funeral expenses and charges provided for by the will.

On July 11, 1877, Thomas C. Coleman conveyed said real estate in mortgage to the Worcester North Savings Institution to secure the sum of $500, and on October 17, 1877, again mortgaged the same to the same grantee to secure the sum of $200, both of which sums were borrowed and used by Thomas C. for his personal use and benefit. Subsequently one John J. Sheehan brought suit against Thomas C. upon a promissory note signed by him in consideration of money borrowed for his personal use and benefit, and attached said real estate; and on October 14, 1878, Thomas C. gave a promissory note and mortgage on said real estate for $100 to said Sheehan, to satisfy the judgment obtained in said suit and prevent the sale of said premises thereunder. In the last-named mortgage John F. Coleman, being of full age, joined for the purpose of accommodating Thomas C., Sheehan insisting upon John F. joining in said mortgage.

The last-named mortgage was subsequently assigned to the Worcester North Savings Institution, which subsequently took possession of the mortgaged premises; and on August 18, 1879, they were sold by auction under a power of sale contained in the mortgage, and bid in by the attorney of said bank for the sum of $125, and he on the same day conveyed the same to one Ryan in consideration of the sum of $1040, which was received by the bank in payment of said mortgage debts and the expenses of sale. None of these transactions were known to the defendant until after their occurrence.

Due demand was made by John F. Coleman upon Thomas C. and the defendant, for the payment of the sums due the former for his said school expenses, prior to the bringing of this action.

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At the time John F. signed said mortgage to Sheehan, he was ignorant of the fact that Thomas C. had previously mortgaged said real estate to said bank.

The case was argued at the bar in October 1880, by *H. C. Hartwell*, (*J. H. McMahon* with him,) for the plaintiff, and by *G. A. Torrey*, for the defendant; and was submitted on briefs in October 1882, by the same counsel.

C. ALLEN, J. The question whether the legacy to John F. Coleman, of the expenses of his education, was a charge upon the real estate, depends upon the intention of the testatrix, as gathered from an examination of the whole of her will, in view of the existing circumstances. Particular facts have often been declared to be especially significant, as indicating such intention, and sometimes, indeed, a rule has been laid down in terms apparently absolute. Thus it is said in Hawkins on Wills, 294, that "if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate." This rule is founded on the decisions in *Greville* v. *Browne*, 7 H. L. Cas. 689, 696, 697; *Francis* v. *Clemow*, Kay, 435; *Harris* v. *Watkins*, Kay, 438; *Wheeler* v. *Howell*, 3 Kay & Johns. 198, 203; *Cole* v. *Turner*, 4 Russ. 376; and earlier English cases. It is adopted in terms in *Corwine* v. *Corwine*, 9 C. E. Green, 579; and it also finds more or less confirmation in other American cases. See *Lewis* v. *Darling*, 16 How. 1, 10; *Adams* v. *Brackett*, 5 Met. 280; *Downman* v. *Rust*, 6 Rand. 587, 591; *Davis's appeal*, 83 Penn. St. 348, 353; 2 Perry on Trusts, § 570.

So, where the devisee of real estate is appointed executor, and is expressly directed to pay legacies, it has been considered as sufficient to show an intention that the land should be charged. *Preston* v. *Preston*, 2 Jur. (N. S.) 1040. *Dover* v. *Gregory*, 10 Sim. 393. *Henvell* v. *Whitaker*, 3 Russ. 343. 2 Jarm. Wills, (5th Am. ed., by Bigelow,) 595, 596, and cases cited. This also has been considered as a significant indication of such intention in this country. *Van Winkle* v. *Houten*, 2 Green Ch. 172, 191. 2 Perry on Trusts, § 570.

So, where the devisee of real estate, though not appointed executor, is positively directed to pay legacies, especially if such direction is contained in the same sentence with the devise, or

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appears to be given in consideration thereof, it has been held sufficient to create a charge on the real estate. *Sands* v. *Champlin*, 1 Story, 376. *Merrill* v. *Bickford*, 65 Maine, 118. *Luckett* v. *White*, 10 Gill & J. 480. *Bank* v. *Donaldson*, 6 Penn. St. 179. *Harris* v. *Fly*, 7 Paige, 421. If no other provision is made in the will for the payment of the legacies, this is considered to add to the strength of the presumption. *Bevan* v. *Cooper*, 72 N. Y. 317. Significance has also been attached to the fact that there was no personal property which the testator could have thought sufficient for their payment; though it may be open to question how far this consideration ought to be taken into account. *Paxson* v. *Potts*, 2 Green Ch. 313, 321. *Wallace* v. *Wallace*, 3 Foster, 149, 156. So, also, where all the personal property is otherwise disposed of. *Bevan* v. *Cooper*, *ubi supra*.

The fact that the legacies are given to the testator's wife or children has been thought entitled to much consideration. *Van Winkle* v. *Houten*, *Bevan* v. *Cooper*, *ubi supra*. And in *Sands* v. *Champlin*, Mr. Justice Story lays peculiar stress on the circumstance, that the testator was making a provision for his widow, to be furnished annually. "His intention," he says, "was to have a fund for the security of the payment *durante viduitate*, which can only be by construing the will as making the legacies a charge on the estate." 1 Story, 383, 386. See also *Leavitt* v. *Wooster*, 14 N. H. 550, 562; 2 Jarm. Wills, (5th Am. ed.) 582, and Bigelow's note.

In considering cases arising in other jurisdictions, the different systems which may there prevail in respect to the statutory liability of real estate for the payment of debts and legacies must not be overlooked; and language which is merely declaratory of the doctrine that real estate generally will, from certain phraseology, be held subject to the payment of legacies, in such sense that it will be the duty of the executor to obtain leave to sell real estate for that purpose, may not have direct application to the question now before us. But, looking at the present case with a view to ascertain the probable intention of the testatrix, we find that the legatee was her son. He was at school and preparing to enter college. The legacy was for the purpose of paying the expenses of his education until he should be through college, and was of course to be paid from time to time,

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extending over a period probably of some years. The devisee was appointed executor, and to him the whole property, both real and personal, was given. The direction to pay the expenses of John's education was contained in the same sentence with the devise of the property, and in such close connection as to show that the devise was intended to furnish the means of paying them. There was, indeed, no other source from which the means of paying the legacy could come. The testatrix was apparently as anxious to provide for the younger son as for the older. These considerations have brought a majority of the court to the conclusion that she must be deemed to have intended to subject the property which she left, real as well as personal, to the payment of the expenses of John's education, and that the devise to Thomas was on an implied trust for that purpose, just as if it had been given to him "on condition," or "in consideration," or "provided," that he should bear such expenses, or "it being understood" that he should do so.

The charge upon the land, in the absence of anything to lead to a contrary result, would bind all who claim under the devisee till payment of the legacy.

The legatee might also have a remedy upon the executor's bond at his election. *Sheldon* v. *Purple*, 15 Pick. 528. But, in case of his enforcing this remedy, inasmuch as the land is primarily charged by the testatrix herself, the sureties would be subrogated to the right of the legatee to proceed against the land. See *Johnson* v. *Bartlett*, 17 Pick. 477; *Atwood* v. *Vincent*, 17 Conn. 575; and cases cited in Sheldon on Subrogation, §§ 89, 90, 131. If, therefore, the legatee, by his voluntary act, discharges the land from the lien, this would have the effect to cut off the sureties from proceeding against the land, because they can get no greater rights by subrogation than he had to whose rights they are subrogated.

In the present case, the legatee joined in a mortgage of the land charged with the payment of his legacy, and thereby conveyed to the mortgagee all his right in the land, — his right to enforce his legacy against the prior mortgagee, as well as his right to enforce it against the holder of the equity of redemption. After the foreclosure and sale, under the power of sale contained in this mortgage, the whole right of the legatee to proceed

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against the land was gone, even as against those mortgages in which he did not join. At most, he had only an equitable right in the land; and, by joining in the mortgage, he transferred his whole equitable right to the mortgagee. It follows, therefore, that the defendant, if he were to pay to the legatee the unpaid balance of the legacy, would be unable to proceed against the land for his reimbursement, by reason of the legatee's having joined in this mortgage; and, being deprived by the voluntary act of the legatee of this remedy over, he ought not to be held to make the payment. *Guild* v. *Butler*, 127 Mass. 386; and numerous cases collected in Sheldon on Subrogation, § 86.

Judgment for the defendant.

INHABITANTS OF COTTAGE CITY *vs.* INHABITANTS OF EDGARTOWN.

Bristol. Oct. 26, 1882. — Jan. 6, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

Under the St. of 1880, *c.* 18, dividing one town and incorporating another town therein named, and providing in § 5 that in case said towns should not agree in respect to a division of debts, unpaid taxes, state or county taxes, or support of paupers, the Superior Court should, upon petition of either town, appoint three commissioners to hear the parties and determine the matters of difference, that their award, being accepted by said court, should be final, and that the court might make any order or decree upon the award, but it should not be set aside except for fraud or manifest error, in which case the court might recommit the award or appoint new commissioners, neither party has a right of appeal from the decision of the Superior Court accepting an award of commissioners appointed pursuant to the statute.

PETITION to the Superior Court, under the St. of 1880, *c.* 18, § 5, for the appointment of commissioners to hear the parties and determine certain matters of difference between them. The Superior Court appointed three commissioners, who made their award, which was accepted by the court; and both parties appealed to this court.

H. M. Knowlton, for the petitioner.

G. Marston, for the respondent.

MORTON, C. J. The act dividing the town of Edgartown and incorporating the town of Cottage City provides that, in case

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said towns "shall not agree in respect to a division of debts, unpaid taxes, state or county taxes, or support of paupers, the Superior Court for the county of Bristol shall, upon petition of either town, appoint three commissioners . . . . to hear the parties and determine the matters of difference; and their award, or the award of any two of them, being accepted by said court, shall be final." The court may make any order or decree upon said award, but it shall not be set aside unless for fraud or manifest error, in which case the court may recommit the award or appoint new commissioners. St. 1880, *c.* 18, § 5. The authority given to the Superior Court and to the commissioners is a special authority conferred for a special purpose. The statute contains no provision that either party may appeal from the decision of the Superior Court; on the contrary, it declares that the award of the commissioners, being accepted by the court, shall be final. The authority of the Legislature in regard to the division of towns is supreme. It may dictate such terms as it sees fit, and the towns have no right of appeal to a jury or the court. Upon examining the numerous statutes for the division of towns, it is found that, in some cases, the Legislature establishes arbitrary rules for the division of the debts, property, taxes and paupers of the towns; but a very large proportion of the statutes contain provisions, like those in this case, that, if differences as to these matters arise between the towns, the Court of Common Pleas or the Superior Court shall appoint disinterested persons to determine the matters of difference, whose award, when accepted by the court, shall be final. Sometimes these persons are called referees, and sometimes commissioners. It is not known that any appeal from the decision of the Common Pleas or the Superior Court in such cases has ever been taken to, or entertained by, this court. The manifest policy of the Legislature has been to provide for the speedy settlement of differences between the towns, and to prevent protracted litigation. For these purposes it creates a special tribunal to determine these matters of dispute, and, as it declares that the decision of this special tribunal shall be final, the right of appeal to this court is excluded.

It follows that, in the case before us, neither party has a right to appeal from the decision of the Superior Court accepting the award of the commissioners. *Appeal dismissed.*

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NEW BEDFORD INSTITUTION FOR SAVINGS & another *vs.* GUILFORD H. HATHAWAY.

Bristol. Oct. 25, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The holder of a promissory note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another surety and then assigned the note with his claim against the estate to the solvent surety, who paid the holder in full. *Held*, on a bill in equity, that this amounted to payment of the note, and that the Court of Insolvency rightly ordered the proof to be expunged, and the surety to prove only one half of the claim, although he would not receive more than half of what he had paid for the note, if allowed to prove to the full amount.

BILL IN EQUITY, filed June 17, 1881, by the New Bedford Institution for Savings and Stephen Davol, against the assignee in insolvency of the estate of William C. Davol, to reverse an order of the Court of Insolvency expunging the proof made by the first-named plaintiff as holder of a promissory note, signed by the insolvent as surety. The case was heard by *Field*, J., on the bill and answer and the report of a commissioner; and the following facts were found by him:

On March 8, 1879, William C. Davol was adjudged insolvent, and the defendant was duly elected and appointed assignee of his estate. The plaintiff bank was at this time the holder of a promissory note for $9000, dated August 6, 1878, payable on demand, and signed by William C. Davol, Jr. as principal, and by William C. Davol, the insolvent, and the plaintiff, Stephen Davol, as sureties.

After William C. Davol was adjudged insolvent, and William C. Davol, Jr. was reputed to be insolvent, the plaintiff bank called upon Stephen Davol for payment of the note; and it was agreed between the bank and Stephen Davol that he should give collateral security to secure his liability on the note, and that the bank should prove the note against the estate of William C. Davol, and that, after the same was proved and allowed, the bank should, upon his taking up the note by paying to the bank the amount due thereon, assign and transfer to Stephen Davol, or to such person as he might designate, the proof, dividends and the note. The purpose of this agreement was to assign to

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Stephen Davol the same, and to subrogate him to all its rights concerning the proof by the bank and the dividends it would be entitled to receive, the bank desiring that the note should be paid, but being ready for the benefit of the surety to make this agreement.

The note was duly proved against the estate of William C. Davol by the bank, for the whole amount of the note. On August 12, 1879, Stephen Davol took up the note by giving to the bank his own note for $7000, and paying the balance due on the same, principal and interest, in cash, and thereupon the bank transferred the note to Stephen Davol, and gave him an order on the assignee of the estate of William C. Davol for the dividends which might be declared on said proof; and this was done pursuant to said agreement. The first dividend upon the estate was not made till after the note was taken up by Stephen Davol, and the assignee of the estate of William C. Davol did not know of this transaction between the bank and Stephen Davol till long after; and, as soon as he found it out, he filed his petition in the Court of Insolvency to expunge said proof. That court ordered the proof to be expunged, with leave to Stephen Davol to prove for one half of the same, and no more.

The principal on the note is without visible means, and the bank or Stephen Davol will not receive more than fifty per cent of the amount due on the note from the estate of William C. or from the estate of William C., Jr., or from both, if the proof of the note is allowed to stand for the full amount.

Upon these facts, the judge ruled that the order of the Court of Insolvency was correct, and ordered the bill to be dismissed; and, at the request of the plaintiffs, reported the case for the consideration of the full court, such decree to be entered as justice might require.

J. M. Morton, for the plaintiffs.

H. K. Braley, for the defendant.

DEVENS, J. Whatever agreement was made between Stephen Davol and the bank, by which Davol sought to enforce against William C. Davol, his co-surety, a claim for the entire debt for which they were jointly responsible as sureties of William C. Davol, Jr., the effect of the transaction was at law a payment of the debt. Stephen Davol gave his own note for a portion of

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the original note, paid the remainder in cash, and took an assignment of the original note and an order on the assignee of the estate of William C. Davol for the dividends which might be declared on the proof of the original note, which had already been made.

Payment by one of several joint debtors, although it be made by him in the form of a purchase, and be accompanied by an assignment of the debt, is still a discharge of the debt. If the debt be in the form of a judgment, such judgment cannot be enforced by him against his co-debtor, even for his proportion. *Hammatt* v. *Wyman*, 9 Mass. 138. *Brackett* v. *Winslow*, 17 Mass. 153. *Adams* v. *Drake*, 11 Cush. 504. Where the payment thus made is by a surety, as he is entitled in equity to be subrogated to the right which the creditor may have in the securities which have been given him by the principal debtor, so that he may enforce them for his own benefit, the debt is there treated as still existing, so far as it may be required for that purpose. *Wall* v. *Mason*, 102 Mass. 313. The doctrine of subrogation is one recognized in equity, and is ordinarily there enforceable only. It implies an equitable exception to the general principle that payment by one joint debtor discharges the debt as against all, and holds it as continuing to exist for the protection of the parties to the note and the enforcement of their rights *inter sese*. *Wall* v. *Mason*, *ubi supra*. *Edgerly* v. *Emerson*, 3 Foster, 555. *Brewer* v. *Franklin Mills*, 42 N. H. 292.

Collateral securities are, as their name imports, but incidents of the debt, and they would cease to be available, if that were to be deemed absolutely discharged. A mortgage given by the principal debtor to the creditor to secure the debt which it was his duty to pay, and of which the surety actually paying should have the benefit, would itself be destroyed, if, so far as the surety is concerned, the debt were treated as destroyed. The right which the surety has against the principal rests upon the equitable principle that, if such surety pay the debt, he shall be indemnified therefor by the principal, and it is alike equitable that, as between sureties, one paying the debt shall have his remedy against the other, and the benefit of such securities as the latter may have deposited, to the extent of the obligation he has liquidated for him.

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It is indeed said in *Bowditch* v. *Green*, 8 Met. 360, that, by whomsoever the payment of a joint note is made, the collateral security given for the payment thereof is *ipso facto* discharged. This was a case where a surety, having paid a joint note, brought an action at law against a third person upon a note signed by him, which had been transferred to the creditor as collateral security by his co-surety, and which, on payment of the joint note, had been assigned by the creditor to the plaintiff. It had been subsequently paid to the co-surety, who had thus transferred it, and been discharged by him. An equitable proceeding was necessary in order to adjust the rights of sureties, and to determine to what extent either might pursue his claim, upon payment of the whole debt, against the other, or the securities deposited by him. In a suit at law, it was not thought advisable to consider or discuss what might have been the respective rights of the parties, had a bill in equity been resorted to, upon payment by the plaintiff, and had the creditor, debtor and co-sureties been made parties thereto. In that case, if the plaintiff had been allowed to recover upon the collateral note, he would have received more than the proportion of the debt which he had paid on account of his co-surety, and the estate of the latter would have paid correspondingly more than it should have done.

But if it be conceded that the surety paying the debt is equitably entitled to the benefit of such security as may have been deposited with the creditor by the other surety, or may have been obtained against him, the question still remains whether he is entitled to such security, only to the extent of enforcing a claim for that which he has paid on behalf of the co-surety, or whether he may enforce the full claim which the creditor had against the co-surety, provided that he does not himself thus obtain more than he has actually paid on behalf of the co-surety.

The latter is the contention of the plaintiff Davol. The bank, before the transaction which took place between itself and Stephen Davol, and which must be deemed a payment, except so far as the existence of the debt is necessary for the protection of those paying it, by the enforcement of the collateral securities or in any other appropriate mode, had proved the entire

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debt against the estate of the co-surety. The plaintiff Davol deemed himself entitled to the benefit of this proof in the name of the bank, in order that he might obtain a dividend on the whole debt, provided he did not obtain thereby more than fifty per cent. This proof made by the bank was expunged by the Court of Insolvency, and the plaintiff Davol was permitted to prove for fifty per cent of the debt only, that being the amount which he had paid on behalf of the co-surety, and for which he was equitably entitled to contribution from him. Even if cases can be imagined where the proof of a debt in insolvency made by a creditor should be preserved for the benefit of the surety paying the debt, as where, for instance, the time for proof of debts had fully elapsed, yet if in such case the surety could be permitted to avail himself of it, only to an amount equal to the debt which was equitably due to him from the co-surety, and thus to a dividend upon that amount, the plaintiff Davol here needs no relief, as all to which he is entitled he has received under the proof he has been allowed to make.

Upon the inquiry involved, the authorities are certainly conflicting. In *Hess's estate*, 69 Penn. St. 272, H. and C. were co-sureties for S., who made an assignment for the benefit of creditors. H. died insolvent, and C. paid the whole debt. The estates of H. and S. were not sufficient to pay fifty per cent of the claim; and it was held that C. was subrogated to the claim as proved, and entitled to a dividend on the whole claim from the estate of H. It is contended that this decision is sustained by the case of *Lidderdale* v. *Robinson*, 2 Brock. 159, afterwards affirmed in 12 Wheat. 594. But in that case the important question was whether a surety who had paid more than one half the debt was entitled to have his claim substituted, as against his co-surety, to the same rank and dignity with the debt which he had paid, as to the excess over and above one half thereof, it having been a specialty debt. This was the only question certified to the Supreme Court, and there decided. It does not bear upon the question whether such co-surety could have been substituted for the creditor for more than one half. It is said by Chief Justice Marshall, "Where a person has paid money for which others were responsible, ... he shall be substituted, to every equitable intent and purpose, in the place of

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the creditor whose claim he has discharged." But these remarks are to be taken in connection with the case in which they were uttered, where the surety was seeking to enforce a claim for an amount equal to that which he had paid over and above his own share.

The case of *Ex parte Stokes*, De G. 618, also sustains the position of the plaintiffs. A bond was there entered into by the principal and three sureties. The principal and one of the sureties compounded with the creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estate of the two bankrupts, and claimed under the composition, and by these means received twenty shillings in the pound, but the compounding surety paid more than his contributive share; it was held that his estate was entitled to the benefit of the proof made by the obligee against the bankrupt surety, and that when, as between the estates of the two sureties, one having become bankrupt, the creditor had proved his debt under the fiat, and had afterwards been paid in full, partly by the principal debtor and partly by the surety not a bankrupt, the latter had the right to use the proof for the purpose of obtaining from the bankrupt's estate that amount of contribution to which the bankrupt was, or but for the bankruptcy would have been, liable, so far as the proof could furnish means for that end. It was said by the Vice Chancellor, in deciding it, that he did not think the case free from difficulty.

No notice was taken of the case of *Keith* v. *Forbes*, 3 Paton, 350, and *S. C. nom. Maxwell* v. *Heron*, 3 Ross Lead. Cas. 129, affirming a Scotch appeal, which did not apparently involve any principle peculiar to the law of Scotland, in which it is held that, when a co-surety has paid the full amount of the principal debt, he is not entitled to rank on the estate of an insolvent co-surety for the whole debt, to the effect of enabling him to draw the sum which the insolvent surety would have paid if he had continued solvent, but he is entitled to rank for that sum only. Nor of the case of *Ex parte Elton*, 3 Ves. 238, where Lord Chancellor Loughborough, after stating that if, where B. and C. are partners, the creditor proves his whole debt against the separate estate of the insolvent copartner, the assignees of

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that estate have no claim against the estate of the solvent copartner, unless the amount received by them exceeds fifty per cent, adds: "If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him; and he has a right to come in as a separate creditor of the bankrupt to the amount only of a moiety of that debt; for a moiety only of the debt of the partnership he could have recovered against him, if he had been solvent." "That," he also observes, "makes a very great difference to the separate creditors."

In this conflict of authority, we are brought to the conclusion that neither in his own name nor in that of the creditor ought the surety paying the debt to enforce any claim against his co-surety, except for the amount actually paid by him for his co-surety, and if, by reason of the insolvency of such surety, there is a loss, it is one to which the relation in which they stand to each other compels him to submit. Whether the liability of the co-surety is rested upon an implied contract or on the general principles of equity, it is a liability only for that which the other has paid for him. The argument that the paying surety should be allowed to retain and avail himself of the proof of the whole debt made by the creditor, because he will thereby obtain only the amount which his co-surety ought to and would pay if he were not insolvent, is fallacious. He should be allowed to use the creditor's name, or the security the creditor has obtained, only to enforce the right which he has against the co-surety by reason of the payment which he has made on his account, and that was a payment of but one half the debt. As between himself and his co-obligor, it was his own duty to pay the other half. Because the creditor might have proved and received a dividend upon the whole debt, this affords no reason why the paying surety should. To the creditor the co-surety had promised he would pay the whole debt, but as between the sureties each was a debtor only to the amount of his proportion. To allow a co-surety to exaggerate this claim would do injustice to other creditors of the insolvent surety. It would be using the fiction of the law that the debt is still unpaid, — which is adopted in equity to protect the paying surety by keeping the debt alive in order that securities may be realized for his benefit, — so that

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unfair advantage would thereby be taken of other creditors of the insolvent. It is true that, as the creditor may think fit to proceed, different results to the surety may sometimes occur. If the creditor takes full payment from the solvent surety, it will be for the advantage of the estate of the insolvent surety. If, on the other hand, he proceeds in the first instance against the estate of the insolvent surety, it is for the advantage of the solvent surety. This result is produced by the different liability which the sureties owe to the creditor, and that which they are under each to the other, but it affords no reason for enlarging the latter.

The case of *Apperson* v. *Wilbourn*, 58 Miss. 439, in some respects resembles *Ex parte Elton*, *ubi supra*. The creditor had proved his whole debt against the estate of one surety who was insolvent, but had received less than one half therefrom. The remainder having been paid by the solvent surety, a bill was filed against him on behalf of the insolvent estate to compel the solvent surety to pay to the insolvent estate one half the sum paid by it upon the bond to the creditor. The bill was dismissed. It is said by the court *arguendo*, "We are quite sure that if the solvent estate had paid the debt it would have been entitled to prove only one half of it against th other, and to receive a dividend on the half; but as the credit r got less than half the claim from the insolvent estate, no righ exists in it to visit on the estate of the other surety the loss it w ould have had to bear if the creditor had resorted to it in the fi t instance for the whole demand."

As we deem the plaintiff to have obtained all to which he was entitled, by being permitted to prove his claim against his co-surety for the full amount which he had actually paid for such co-surety, he is not entitled to any relief in equity.

Bill dismissed.

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ALFRED G. ALLEY *vs.* JOHN WINN.

Bristol. Oct. 25, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If a husband and wife live apart by mutual consent, the wife receiving a sum not sufficient for her support, and agreeing that she will release her dower in his land, thereafter support herself and make no claim upon him, he is not liable for necessaries furnished to her, she not having, after such arrangement between them, made any claim upon him for support, or offered to return to him.

CONTRACT for necessaries furnished to Susan B. Winn, the wife of the defendant, while living apart from him, from October 14, 1881, to February 7, 1882. At the trial in the Superior Court, before *Colburn*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. Brown, for the defendant.

H. M. Knowlton, (*A. E. Perry* with him,) for the plaintiff.

DEVENS, J. At the trial, upon the evidence offered upon both sides, the court ruled that "the wife had no justifiable cause to leave her husband, and could not carry his credit with her on that account." To this ruling no objection was made, but, against the defendant's objection, the court also instructed the jury, that if the husband and wife were living separately and apart by mutual consent or his voluntary consent, and she had no means of support, and he had made no provision for her support, he would be liable to pay for articles furnished her which were necessaries, during such separation or living apart from each other. This is a correct statement of the law upon the facts embraced in the proposition, and to it the defendant has no just exception, if it was all that the case required.

It is to be considered whether there were other facts of importance appearing in the case which called for other or additional instructions, and whether these were called to the attention of the presiding judge by any proper request. Whether the wife left the husband originally with his consent or not, was in dispute; but it appeared that some time after such departure a proceeding had been brought by her for a separate maintenance;

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and that an agreement was then made between the husband and wife, that, if he would pay her the sum of $300, she would release her dower, whenever requested by him, in any lands he might hold, and would make no further claim on him for support or any other cause; that this money had been paid, and that she with a surety had actually executed a bond to him conditioned that she would make no such claim. It did not appear that she had thereafter offered to return to her husband, or had made any claim upon him for support.

The defendant asked the court to rule, as matter of law, that the evidence did not show that they were living separately and apart by such mutual consent, or under such circumstances as would render him liable for her support during the period of her absence. The defendant also contended that, at the legal proceeding in 1875, he had provided for her support. While the attention of the presiding judge was drawn less distinctly than it should have been to the effect of the transaction into which the husband and wife had entered, or assumed to enter, at the termination of the proceeding by the wife for a separate maintenance, yet the request, in connection with this evidence, that the jury should be instructed that they were not living apart "by such mutual consent and under such circumstances" as would render the husband liable for her support, so far brought this matter to the consideration of the court, that, if the defendant was entitled to an instruction to this effect, based on the arrangement made by the two parties, he may properly ask a new trial.

In this view, the inquiry is presented whether, if a husband and wife live apart by mutual consent, the wife receiving a sum not sufficient for her support, but agreeing that she will release dower, thereafter support herself, and make no claim upon him, she so carries his credit with her that she may render him responsible for necessaries, not having, after such arrangement, made any claim for support, or offered to return.

The ground upon which a wife is entitled to pledge the credit of her husband is usually treated as depending upon the doctrine of agency. Sometimes this right results merely from its general principles. Where a wife is at the head of a household, and, acting as its mistress, orders the usual supplies, such as are

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needed for its appropriate maintenance, or even the clothing of its younger members, who are taken care of by others, the ordinary reasons upon which it is held that any one who holds out another as authorized to contract for him is bound by the agreements thus made, would make the husband liable.

Beside this agency, which would be inferred from cohabitation, there is an agency on the part of the wife, resulting from the marital relation, which authorizes her to bind him even against his will. His consent in such case is conclusively implied by reason of this relation. As it is his duty to furnish her suitable support, if he fails to do so while she is residing with him, he is liable for necessaries suitable to her condition in life. *Dexter* v. *Booth*, 2 Allen, 559. *Raynes* v. *Bennett*, 114 Mass. 424. If he drives her from his house, or so conducts himself that she is justified in leaving by reason of his adultery, his violence or his cruelty, she carries his credit with her, so far as necessaries are concerned. If she lives apart from him by his consent, no condition or agreement being made that she shall support herself, she not having the means of support and no proper provision being made therefor by him, she carries his credit with her for necessaries. On the other hand, where the wife, without justifiable cause, abandons her husband, or where, as by reason of her adultery, he is justified in withdrawing from her society, she does not carry his credit with her.

These are familiar principles; but a class of cases is presented where the husband consents that the wife may live apart from him, upon the agreement that she will accept a certain sum for her support, and will thereafter maintain herself from her own means or by her own exertions. The law applicable to such cases should have been considered in the instructions in the case at bar. The transaction, by which the suit brought by the wife was determined, was not a mere settlement of a lawsuit, but an agreement between the two parties that, on the payment of a certain sum, the wife would thereafter make no further claim upon him for support, or for any cause whatever. While made by attorney on either side, the right of the attorney to make it was not questioned. It was accompanied by a bond, with surety, made by the wife to the husband, conditioned to perform this agreement. The account for necessaries furnished the wife was

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incurred several years after this transaction, and she had never returned or offered to return to the husband, or called on him for support.

The effect of a transaction such as this does not appear to have been discussed in any Massachusetts case. It differs from those where it has only appeared that the wife has lived apart by consent of her husband, no proper provision being made for her support, in this, that the dwelling apart was here accompanied by an agreement that she would support herself and would no longer make any claim upon the husband. We assume that the sum of $300 was not a sufficient permanent provision for her. Certainly it might properly have been held insufficient by any jury.

In *Biffin* v. *Bignell*, 7 H. & N. 877, it was held that, where a husband and wife agreed to live apart, the wife agreeing to accept an inadequate provision for her support, and then to maintain herself, the consent of the husband must be deemed a conditional one; that, if the condition were not performed, she could not be held to be living apart with his consent; and that he could not be charged with her expenses for necessaries, in the absence of any offer by her to return, or any request by her for support under his own roof.

In *Eastland* v. *Burchell*, 3 Q. B. D. 432, it was held that, where a husband and wife had arranged for a separation, and a provision was made for the wife which was insufficient, but which she consented to accept, agreeing to make thereafter no claim upon the husband for support, the husband was not liable for bills incurred by her for necessaries. Mr. Justice Lush remarked: "Where the parties separate by mutual consent, they may make their own terms; and, so long as they continue the separation, the terms are binding on both." "She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given." Whatever may have been the original separation of the parties in the case at bar, whether by mutual consent or by an abandonment by the wife, whether justifiable or otherwise, yet from the time the agreement was entered into by them, the husband paying the money agreed upon in connection therewith, and the bond having been given

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upon the one side and accepted upon the other, they were living apart upon these terms, to which they had mutually assented. The consent of the husband to this thereafter was based upon the performance by her of her agreement to support herself, and the authorities above cited directly apply. They rest upon the satisfactory reason, that the consent of the husband that the wife shall live apart from him, upon the agreement and condition that she shall support herself, is dependent upon the performance of the condition; and that, failing to perform, she cannot contend, nor can it be contended on her behalf by those who furnish her supplies, that she carries in her absence her husband's credit with her, unless at least she has offered to return to him and the offer has been refused.

In order to avoid misunderstanding, it is perhaps proper to add that we do not here intend to intimate that an agreement by the wife to release her dower, such as was here made, could be enforced, or that the husband could, by an agreement of the wife that she would support herself, exonerate himself from his duty in that matter, should she offer to return to him. No such propositions are before us. We decide only, that, where his consent that she shall live apart from him is based upon her agreement that she shall support herself, it cannot be held to exist when she does not perform the condition, and she is not by such consent, by any implication of law, authorized to pledge his credit for her support.

The instructions given were defective, in failing to call attention to the circumstances under which the husband and wife lived apart, and to the agreement they had made.

Exceptions sustained.

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HENRY J. LANGLEY *vs.* DANIEL A. CHAPIN.

Bristol. January 6. — 22, 1883.

A deed of real estate contained the following clause: "This conveyance is made upon the condition that the said C.," the grantee, "will erect upon said premises a cotton-factory within two years from the date hereof." *Held*, that this was a condition annexed to the estate conveyed, and not a personal covenant with the grantor.

An entry by a grantor of land, for breach of a condition annexed to the land conveyed, is not invalid for want of notice to the grantee.

On a writ of entry, brought by one of two grantors of land against a person claiming under the grantee, to recover the land, on the ground of a breach of a condition annexed to the land conveyed, the tenant's bill of exceptions stated that the demandant entered for breach of condition, and that the other grantor subsequently conveyed his interest to him. *Held*, that, as the respective interests of the grantors did not appear in the exceptions, and as the entry by the demandant might have been made as cotenant or agent of the other grantor, the exceptions did not show that the entry was not sufficient to revest the entire estate; and that the subsequent conveyance was not one of a mere right of reëntry.

A sale of land for non-payment of taxes, if valid, creates a title paramount to any existing estate therein; and such title becomes absolute by the lapse of two years.

If a city has taken a deed of land sold for taxes, under the St. of 1862, *c.* 183, it cannot, after the expiration of two years, under the St. of 1878, *c.* 266, § 10, sell the land to a person not entitled to redeem, except by public auction.

A. conveyed land in a city to B. on a condition. While the land was in the possession of B. it was sold for non-payment of taxes, and a deed made to the city. A. then entered for breach of condition. After the two years allowed by law for the redemption of the land from the tax sale had expired, the city sold the land, by private sale, to B., in consideration of the payment by him of the amount of the tax for which it was originally sold, intervening taxes and charges, and gave him a quitclaim deed of the land. *Held*, that, although the deed was invalid, the payment by B. enured to the benefit of A., and extinguished the title acquired by the city; and that A. could maintain a writ of entry against B. to recover possession of the land.

The finding by the presiding judge, at the trial of a writ of entry, without a jury, that neither the tenant nor his grantor had had such possession of the demanded premises for six years as to entitle either of them to improvements, is conclusive.

WRIT OF ENTRY, dated May 18, 1881, to recover a parcel of land in Fall River. Plea *nul disseisin*. The tenant also filed a claim for improvements. Trial in the Superior Court, without a jury, before *Blodgett*, J., who allowed a bill of exceptions in substance as follows:

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The demandant put in a deed of the land in question from John Jenks and others to himself and Daniel McCowan, dated February 15, 1872, and a deed, dated September 17, 1873, from himself and McCowan to a corporation called the Corbitant Mills, by the terms of which the grantors, in consideration of one dollar, conveyed to said corporation the land in question, and which contained, after the description of the land, and before the habendum, the following clause: "This conveyance is made by us upon condition that the said Corbitant Mills, or its successors, will erect or cause to be erected upon said premises a cotton-factory of not less than twenty thousand spindles within two years from the date hereof."

The demandant's evidence further tended to show that the Corbitant Mills, in the fall of 1873, after the delivery of the deed, and in the spring of 1874, put in the foundation of a cotton-mill, but did nothing after the last-named time towards its erection; and that, in 1877, he entered and took possession for breach of the condition contained in the deed to the corporation, and made a certificate of that fact, which was recorded in the registry of deeds at Taunton. No notice of such entry was ever given to the tenant, or those under whom he claims. The demandant testified that, after taking possession in 1877, he went on the premises very frequently, and never saw the tenant there. The demandant also put in evidence a conveyance from McCowan to himself, dated February 16, 1880.

The tenant put in evidence to show that the city of Fall River, in 1876 and 1877, sold the land in question by public auction, for non-payment of taxes, under proceedings that were regular, and bid it off, and held it until March 1, 1880, when the city gave a quitclaim deed of the land to the Corbitant Mills, the tenant paying the taxes, and that afterwards, on the same day, the Corbitant Mills gave a quitclaim deed of the land to the tenant. The deed from the city of Fall River recited that, on October 12, 1877, the city received from its treasurer and collector of taxes a conveyance of a certain parcel of real estate, upon which there was then due the city, for taxes for the year 1875, the sum of $96.03; that the Corbitant Mills, "who claim to be entitled to redeem said real estate, had paid to the city the sum of $354.81 in redemption thereof, the same being the sum

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due for taxes at the time of sale, together with ten per cent interest per annum thereupon, and all intervening taxes and necessary charges;" and released to the Corbitant Mills, in consideration of $354, "all the right, title, interest and estate which the said city of Fall River acquired under and by virtue of the said deed and all subsequent deeds of its treasurer and collector of taxes, in and to" the land in question, describing it by metes and bounds.

The tenant testified that the Corbitant Mills had expended the sum of $7500 in putting in a foundation and getting out stone on the land; that it built a blacksmith's shop and one or two other sheds on the land; that it did nothing in the way of building the mill after the spring of 1875; that, after the last-named date, the witness went there occasionally, and had the tools and fixtures in the sheds and shops cared for until sold; and that, in 1877, he sold for the corporation one of the buildings on the land.

No tender was ever made by the demandant, or by any one in his behalf, of the taxes and charges for which the land was sold; and, after the entry in 1877, the demandant did nothing to utilize or improve the premises.

The tenant asked the judge to rule that the clause in the deed that the grantee should erect a cotton-mill in two years from the date of the deed was a covenant, if anything; that it could not work a forfeiture of the whole estate; that the demandant could not maintain his action; and that the tenant also had good title by the tax sale and mesne conveyances to him; or, if not, that the title to the land was in the city of Fall River when the demandant sued out his writ, and he could not maintain his action. The tenant also contended that, if judgment was for the demandant, he was entitled to the improvements made by his grantor. The judge ruled that the clause in the deed was a condition, and, not being complied with, worked a forfeiture of the estate; that the Corbitant Mills by its deed from the city of Fall River acquired no title against the demandant, and that the deed on the part of the city of Fall River conveyed no title; that the demandant could maintain his action, and had title; and found as a fact, upon all the evidence, that neither the tenant nor his grantor had had such possession for six years

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as to entitle him or his grantor to improvements; and found for the demandant. The tenant alleged exceptions.

H. K. Braley & M. G. B. Swift, for the tenant. 1. Grants are to be construed beneficially for the grantor, and forfeitures are not favored in law or equity. If it be doubtful whether a clause in a deed is a covenant or a condition, courts will not incline to the latter construction. The deed from McCowan and Langley to the Corbitant Mills is not, by the accepted rule of the present day, a grant upon condition subsequent, but is a conveyance of an absolute title. The words upon which the demandant relies, not being coupled with any clause of forfeiture or reëntry, do not, by the strict rule of common law, work a forfeiture; and a result so disastrous to the tenant is not to be established by mere inference or argument. *Rawson* v. *Uxbridge School District*, 7 Allen, 125. *Chapin* v. *Harris*, 8 Allen, 594. *Ayer* v. *Emery*, 14 Allen, 67. *Sohier* v. *Trinity Church*, 109 Mass. 1. The doctrine in *Gray* v. *Blanchard*, 8 Pick. 283, if ever regarded as a precedent, is overruled by the cases above cited. *Stone* v. *Ellis*, 9 Cush. 95, is not analogous, because in the case at bar the full consideration of the deed was paid.

2. If this is a condition subsequent, it was broken before February 16, 1880. McCowan never availed himself of his rights under it, and his deed to the demandant conveyed no right of reëntry upon the premises. A condition in a grant of land can be reserved only to the grantor and his heirs. The privity existing between grantor and heir does not exist between grantor and grantee. *Rice* v. *Boston & Worcester Railroad*, 12 Allen, 141. *Stearns* v. *Harris*, 8 Allen, 597. *Guild* v. *Richards*, 16 Gray, 309. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80, 85. *Brattle Square Church* v. *Grant*, 3 Gray, 142. *Dana* v. *Wentworth*, 111 Mass. 291. *Skinner* v. *Shepard*, 130 Mass. 180. *Tobey* v. *Moore*, 130 Mass. 448. McCowan has waived the breach of the condition by not availing himself of any forfeiture. *Hubbard* v. *Hubbard*, 97 Mass. 188.

3. The entry of the demandant, without notice to the tenant or his grantors, was not sufficient. He should have given notice of his entry, and the purpose of it. *Erskine* v. *Townsend*, 2 Mass. 493. *Guild* v. *Richards*, *Stone* v. *Ellis*, and *Stockbridge Iron Co.* v. *Cone Iron Works*, *ubi supra*.

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4. The sale and deed to the city of Fall River, for non-payment of taxes, conveyed to the city a good title, subject to the right of redemption. Pub. Sts. *c.* 12, §§ 40, 42. And the demandant, not having availed himself of the provisions of the statute, has no title to, or immediate right of entry upon, the premises. Pub. Sts. *c.* 12, §§ 49, 58, 66.

5. The tenant is entitled to compensation for improvements. Pub. Sts. *c.* 173, § 17. The entry of the demandant in 1877 being insufficient to terminate the estate of the Corbitant Mills and vest it in himself, it is clear that the adverse possession of the tenant and his grantors was more than six years; and he is entitled to compensation for improvements, under the Pub. Sts. *c.* 173, § 18. *McSorley* v. *Larissa*, 100 Mass. 270.

J. M. Morton & A. J. Jennings, for the demandant.

HOLMES, J. The first question raised by the bill of exceptions touches the construction of the clause of the deed of September 17, 1873, to the Corbitant Mills. There is no doubt that it attaches a condition to the estate conveyed. The tenant argues that it amounts only to a personal covenant with the grantors. But there is nothing in the context which warrants any other than the natural interpretation of the words used, and we must therefore assume that they mean what they seem to.

The condition was broken, and the demandant entered for the breach in 1877. The nature of the respective interests of the demandant and McCowan does not appear, and we cannot discover enough in the bill of exceptions to show that the demandant's entry was not made by him as cotenant, or as agent on behalf of McCowan, as well as for himself, or was insufficient for the purpose of revesting the entire estate. *Smales* v. *Dale*, Hob. 120. Co. Lit. 258 *a*. 2 Cruise Dig. tit. 13, *c.* 2, § 43.

The entry was not invalid for want of notice. The cases cited for the tenant lend no countenance to the position, that such an entry must be accompanied by notice in order to be effectual, when there is no ambiguity in the character or purpose of the entry.

Finally, the validity of the entry was not affected by the sale for taxes. This was not argued by the tenant, and it is enough to say that it does not appear distinctly from the bill of exceptions whether the first conveyance under a tax sale was before

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or after the entry, without meaning to intimate that an entry would not have been good after the sale.

The fee was therefore revested in the demandant and McCowan, and McCowan's conveyance to the demandant is not open to the objection urged by the tenant, that it was an attempt to convey a mere right of reëntry.

The rest of the case is made difficult to deal with by the obscurity of the bill of exceptions. The rulings asked by the tenant were open to the objection that they assumed the truth of all the facts which his evidence tended to prove. But the court not only refused the tenant's requests, but ruled that the demandant could maintain his action and had title. Considering the frequent infirmity of tax titles, and that possession is rarely taken under tax deeds, it is hard to believe that the ruling in question was not made subject to a tacit assumption or finding that the demandant had the elder possession, or that there was a defect in the tax proceedings. But as the former does not clearly appear, and as the tenant offered evidence tending to show a valid sale for taxes to Fall River in 1876 and 1877, it seems fair to interpret the ruling as meaning that the demandant had title by his entry, irrespective of any mere possessory right, and notwithstanding the tax sale, even if valid, or the lapse of the period of redemption since that sale took place.

To maintain this ruling, so interpreted, it must either be shown that the tax sale did not affect the demandant's title, but applied only to the existing fee, which was extinguished by the demandant's entry for breach of condition, or that the effect of the sale was subsequently got rid of.

As to the former of these propositions, it is to be observed that the statutes nowhere expressly contemplate a case like the present. But the reasoning and authority of *Parker* v. *Baxter*, 2 Gray, 185, go far to establish that a sale for taxes is a conveyance which deals with the land and creates a title paramount to any existing estate. There can be no doubt that the lien binds the land; Gen. Sts. *c.* 12, § 22; and as the lien depends upon the sale for its efficacy, there is the strongest reason for believing that the sale was intended by the statute to go behind all interests. This construction is confirmed by a reference to the legislation a few years before and after *Parker* v. *Baxter*. The St.

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of 1849, *c.* 213, § 1, reënacted in the St. of 1856, *c.* 239, § 5, provided that "no sale of real estate for taxes shall affect the right of any person not taxable therefor, unless a written demand is first made upon said person, by the collector, for the payment of said taxes." This was repealed by the St. of 1858, *c.* 82, and it may fairly be argued that the Legislature has thus interpreted its own work, and has indicated its will for the future. For, after declaring by implication that a saving act was necessary to prevent the rights of persons not taxable from being affected, it has done away with the saving act, and has reënacted the old laws without it, and thus has signified its intent to make the sale binding on all the world.

The language of the Gen. Sts. *c.* 12, § 35, is entirely consistent with the view we take. By that section, the collector's deed "shall convey . . . . all the right and interest which the owner had therein at the time when the same was taken for his taxes." These words were one of the amendments to the report of the commissioners on the Revised Statutes, and it is pretty clear that they were not intended to cut down the effect of a sale, but simply to declare that the effect was not diminished by an intervening alienation. The sale for taxes therefore, if valid, created a title paramount to the demandant's, and that title became absolute by the lapse of two years.

It remains to consider whether anything has happened since to get rid of the title thus acquired by Fall River. The only material facts are the payment by the Corbitant Mills and the deed from Fall River to the corporation on March 1, 1880. The deed conveyed no title to the Corbitant Mills, as against the demandant, if for no other reason because it was not made in pursuance of a sale by public auction. Sts. 1862, *c.* 183, § 7; 1878, *c.* 266, § 10. *Walsh* v. *Wilson*, 130 Mass. 124, 126. But the question is not on the effect of the deed, but on the effect of the payment.

In order to sustain the ruling that the demandant could maintain his action and had title, it is necessary to hold that the transaction between the city of Fall River and the Corbitant Mills had the same effect as a payment by the demandant within the two years, discharged all claim of Fall River upon the land, and left the demandant's title clear. Such a decision would be

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impossible in any ordinary case; for it amounts to saying, that after the claim for taxes is satisfied and extinguished and the city has become owner of the land which formerly secured it, in fee simple, a party, who by the demandant's entry had become a stranger to the land, and who, if not by the entry, at least by the satisfaction of the claim for taxes, by the sale to the city and lapse of two years, had become a stranger to the claim in any form, (if there is any claim except to enforce the lien,) could, without the concurrence of the demandant, treat the claim as outstanding, could pay it on his own behalf not acting as the demandant's agent, and could by a transaction *in pais* treat the city's interest as only a lien to be discharged by such payment, and thus devest an estate of fee simple, and revest a title in the demandant without his concurrence and without a deed. Such a conclusion strains a good many technical rules; but with regard to tax titles, as they have been dealt with in this Commonwealth, it may be accepted. It must be remembered that the whole machinery of sale to a city has for its only purpose to put a certain sum of money into the treasury in respect of the land upon which that sum is assessed. The city cannot elect to keep the land if it sees fit. It must sell again as soon as the time of redemption is past. Pub. Sts. *c.* 12, § 58. The land is still only a security to it for the money. And, as no one but the owner is entitled to insist on this sale, we do not see why, if they so agree, the city should not be at liberty to receive its taxes and charges from him without further trouble, on the footing of a payment, and why this should not, *ipso facto*, extinguish the statutory title after the two years have elapsed, as it would have extinguished it before; or, in other words, why a certificate of payment should not be as good as a deed.

The remaining steps are not so hard to take. If the demandant could have discharged the city's title by a payment accepted in redemption of the land, then the owner of any interest in the land could have done so. Pub. Sts. *c.* 12, § 57. And having in view the objects of the statute just referred to, without controverting any general doctrine as to payment by strangers, we think that, if the city is willing to permit a redemption by the owner, and the party to whom the premises were assessed presents himself as such, and claims and is allowed to redeem,

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his payment shall have effect by way of redemption, whatever may prove to be the defects in his alleged title.

The result is, that the payment by the Corbitant Mills terminated all estate and interest of the city of Fall River in the demanded premises; and that the demandant was thereafter entitled to recover on the strength of his title alone, irrespective of the superior possessory right which he probably had as against the tenant, who had no rights at all.

The tenant's claim for improvements is disposed of by the finding of the court. *Exceptions overruled.*

ELIZABETH DOE *vs.* THOMAS ERWIN.

Essex. Nov. 8, 1882. — Jan. 6, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The pendency of proceedings in bankruptcy, under the U. S. St. of March 2, 1867, against a debtor, does not suspend the operation of the statute of limitations in his favor.

CONTRACT for money lent in 1872. Writ dated September 20, 1880. Answer: 1. A general denial. 2. The statute of limitations. Trial in the Superior Court, without a jury, before *Wilkinson*, J., who allowed a bill of exceptions, in substance as follows:

The defendant, on September 13, 1872, commenced voluntary proceedings in bankruptcy in the United States District Court of Massachusetts. The bankruptcy proceedings were pending in said court until January 21, 1881, when, the defendant having failed to proceed in the matter of his discharge as ordered by the court, the proceedings were ordered to be stayed.

The plaintiff contended that the statute of limitations did not run against his claim while the proceedings in bankruptcy were pending; and that the time during which said proceedings were pending was to be excluded in computing the period of limitation in this action; and asked the judge so to rule. But the judge declined so to rule, and ruled otherwise; and found and ordered judgment for the defendant. The plaintiff alleged exceptions.

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C. A. Russell, for the plaintiff.

M. J. McNierney, for the defendant.

MORTON, C. J. It is well settled that that the pendency of proceedings under the insolvent laws of this Commonwealth does not suspend the operation of the statute of limitations upon debts which are provable in insolvency, since such proceedings do not prevent the creditor from bringing an action upon his debt. *Collester v. Hailey*, 6 Gray, 517. *Stoddard* v. *Doane*, 7 Gray, 387. *Richardson* v. *Thomas*, 13 Gray, 381. So it has been held that the representation of the estate of a deceased person as insolvent, and the appointment of commissioners, do not suspend the operation of the statute limiting actions against administrators to two years from the time of their giving bonds. *Tarbell* v. *Parker*, 106 Mass. 347. *Blanchard* v. *Allen*, 116 Mass. 447.

The same principle applies to the case at bar. The bankrupt law of the United States does not prohibit a creditor whose debt has not been proved from bringing an action against the bankrupt. It provides that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that, if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed." U. S. St. of March 2, 1867, § 21. U. S. Rev. Sts. § 5106.

This does not suspend the right of a creditor to commence an action, but only prevents him from prosecuting it to final judgment until the bankrupt has an opportunity to obtain his discharge. As it does not appear that the plaintiff's debt was proved, § 5105, which provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt," does not apply to it, and

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we have no occasion to consider what would be the effect of this section in a case to which it does apply. See *Holland* v. *Martin*, 123 Mass. 278.

We are of opinion, therefore, that the Superior Court rightly ruled in this case that the pendency of proceedings in bankruptcy did not suspend the operation of the statute of limitations.

Exceptions overruled.

CHARLES N. MURRAY *vs.* ELIHU F. CHASE.

Essex. Nov. 9, 1882. — Jan. 6, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

An affidavit, made and signed by the attorney of one party to an action, — stating that a material witness is sick and unable to attend the trial, and would, if present, testify to certain facts set forth, as he has been informed by his client, — and filed for the purpose of procuring a continuance of the trial, which is refused, upon the adverse party admitting that the witness would, if present, testify to the facts stated in the affidavit, and agreeing that the same should be received and considered as evidence, is not admissible in evidence for the adverse party, upon the witness appearing and testifying materially differently from what it was stated in the affidavit he would testify to, it not appearing that the affidavit was known to or authorized by the party in whose behalf it was made.

TORT for assault and battery. Answer, a general denial.

In the Superior Court, before *Rockwell*, J., two days before the trial began, the defendant's attorney moved for a continuance, on the ground of the absence and sickness of the defendant's wife, an important witness; and the attorney made and filed an affidavit, signed by himself, alleging that the defendant's wife was a material witness, that she was sick and unable to attend the trial, and that, if present, she would testify to certain facts set forth, as he had been informed by the defendant. The plaintiff, under the 26th rule of the Superior Court, admitted that the witness would, if present, testify to the facts stated in the affidavit, and agreed that the same should be received and considered as evidence on the trial, in like manner as if the witness was present and had testified thereto; and a continuance was refused.

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At the trial, the defendant's wife appeared as a witness, and testified materially differently from what it was stated she would testify to in the affidavit. The plaintiff then offered the affidavit in evidence; and it was objected to by the defendant, and excluded by the judge, against the plaintiff's exception.

The jury returned a verdict for the plaintiff in the sum of one cent; and he alleged exceptions.

E. J. Sherman & C. U. Bell, for the plaintiff.

J. C. Sanborn, for the defendant.

MORTON, C. J. We can see no ground upon which the affidavit of the defendant's attorney, made for the purpose of procuring a continuance, was competent evidence. The plaintiff contends that it is admissible under the rule which permits proof that a party to a suit has suppressed evidence, or has suborned or attempted to suborn a witness. Such acts of a party are competent, because they are in the nature of admissions, and tend to show a consciousness that he has not a good case, the fair inference being that, if a man has a good case, he will not resort to corrupt means to sustain it. This rule cannot justly be extended to cover this case. The affidavit is not the act of the defendant; it does not appear that it was made by the counsel in his presence or by his dictation, or that he ever approved it or even knew that it had been made. There is nothing to show that the error in stating what the defendant's wife would testify to was not an innocent mistake of the counsel. If a similar affidavit made by the defendant himself would be competent, which we need not decide, this bill of exceptions does not show that he authorized or is responsible for the erroneous statements of his counsel. *Exceptions overruled.*

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CHARLES A. TABER *vs.* WILLIAM R. LAWRENCE & another.

Essex. Nov. 10, 1882. — Jan. 6, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A purchaser in possession of property bought of a debtor, an assignment of whose estate has been made under the insolvent law, part of which property so sold belonged to him before his insolvency, and part of which was acquired afterwards, may maintain an action of tort in the nature of trover against a person who attaches the property as that of the insolvent.

MORTON, C. J. This is an action of tort in the nature of trover. It appeared at the trial that one Pratt, being in possession of the property in question, sold and delivered it to the plaintiff, in July 1881. The defendants introduced evidence that said Pratt filed his petition in insolvency, and that an assignment of his property thereunder was made, in December 1880, and also evidence that a portion of the property belonged to Pratt before his insolvency. They then asked the court to rule "that said Pratt had no right, by reason of said assignment, to sell said property to the plaintiff;" and the court so ruled. The plaintiff thereupon offered to prove that a portion of the property was bought by Pratt after his petition in insolvency and after the assignment; but the court ruled "that the plaintiff could not, by reason of said assignment in insolvency, even with the evidence offered by the plaintiff as above stated, maintain his action, as Pratt's assignee had a right to the property, and that, at the time of the alleged sale, Pratt could convey no title to it; and ordered a verdict for the defendants." It is probable that the presiding justice made this ruling under some misapprehension of the offer of evidence made by the plaintiff. It is too clear to admit of doubt, that the assignment could not have any effect upon property acquired by Pratt after the institution of proceedings in insolvency.

But we are also of opinion, that the ruling was erroneous so far as it related to property which belonged to Pratt before the insolvency. In trover, possession of the goods under a claim of title is sufficient evidence of property, as against one who shows no better right. 2 Greenl. Ev. § 637. *Burke* v. *Savage*, 13 Allen, 408. The only title set up by the defendants is under an

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attachment of the goods as the property of Pratt. If his assignees are entitled to it under the assignment, the attachment is invalid, and they are the only parties who have the right to call the plaintiff to account. *Hubbard* v. *Lyman*, 8 Allen, 520. *Pomroy* v. *Lyman*, 10 Allen, 468. The defendants show no title to the property, but are mere strangers and trespassers. As against them, the possession of the plaintiff under a claim of right is sufficient evidence of title in him to enable him to maintain this action. *Exceptions sustained.*

S. C. Bancroft, for the plaintiff.

E. N. Hill & F. Cunningham, for the defendants.

JOHN WALLACE *vs.* MERRIMACK RIVER NAVIGATION AND EXPRESS COMPANY.

Essex. Nov. 1, 1881; Nov. 10, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If a person sails for pleasure in his yacht on the Lord's day, in violation of the Gen. Sts. c. 84, § 2, and if, while he is so sailing, his yacht is injured by being negligently run into by a steamboat, his unlawful act necessarily contributes to the injury, and he cannot maintain an action therefor against the owner of the steamboat; but if the act of those in charge of the steamboat, in running against the plaintiff's yacht, was wanton and malicious, he can maintain such action, if they were acting within the general scope of their employment, and were executing their master's business.

DEVENS, J. The plaintiff was sailing his yacht on the Lord's day, and thus travelling in violation of the Gen. Sts. c. 84, § 2, which permits this only for reasons of necessity or charity, none of which are assigned by him. He contends that he may recover upon the first count of his declaration, alleging that the defendant carelessly and negligently ran its steamboat into his yacht while thus sailing. Where the illegal act of a plaintiff contributes to the injury he receives from the carelessness of another, he cannot recover; but if his illegal act is independent of the injury, he is not thereby precluded from recovering, although at the time he was acting in violation of law. *McGrath* v. *Merwin*, 112 Mass. 467. *Lyons* v. *Desotelle*, 124

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Mass. 387. The illegal act, although contemporaneous, is then a condition merely, and not a contributory cause of the injury. *White* v. *Lang*, 128 Mass. 598. But where one travelling on the highway in violation of law sustains injury by collision with the vehicle of another carelessly driven, his own illegal act is an essential element in the case as proved by him. *Lyons* v. *Desotelle*, *ubi supra*. No distinction can be made between travellers with their vehicles upon the highway and those who travel for pleasure in their boats upon the river. In either case, the act of him who unlawfully travels is not merely a circumstance attending the injury, but a cause contributing to its occurrence. The plaintiff has therefore no just ground of complaint on account of the ruling of the presiding judge, that he could not maintain his action upon the first count of his declaration.

There was evidence in the case tending to show that the defendant was a common carrier of passengers, but the question whether the facts would present a case such as contemplated by the terms of the St. of 1877, *c.* 232,* and whether that would have any application, was not raised at the trial, nor is it here considered.

The second count of the plaintiff's declaration alleges, not a careless and negligent act on the part of the defendant in running down his boat, but a wanton and malicious one. Upon such a state of facts, although the plaintiff was in violation of the law forbidding travelling upon the Lord's day, his title to an action would be independent of his unlawful act. He would not thereby forfeit the general protection of the law, and the injury in such supposed case would proceed solely from the wrongful act of the defendant. *Kidder* v. *Dunstable*, 11 Gray, 342. *Smith* v. *Gardner*, 11 Gray, 418. *Counter* v. *Couch*, 8 Allen, 436. *Welch* v. *Wesson*, 6 Gray, 505. *Spofford* v. *Harlow*, 3 Allen, 176. *Damon* v. *Scituate*, 119 Mass. 66. *Smith* v. *Conway*, 121 Mass. 216. The learned judge who presided apparently recognized this as the law; but, as in his opinion "the evidence of the plaintiff, uncontradicted and uncontrolled, would

* Section 1 of this act, which took effect on May 15, 1877, provides that the Gen. Sts. *c.* 84, § 2, "prohibiting travel on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."

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authorize the jury in finding that the defendant's servants wilfully and maliciously ran the steamer upon the plaintiff's boat," he ruled "that for such an act upon the part of its servants the defendant would not be responsible;" and thereupon directed a verdict for the defendant. This instruction treats the defendant as exonerated from responsibility, if the act done by its servants was wanton and malicious, and disregards the inquiry whether they were acting under the general authority of the defendant as their master, and for the purpose of executing its orders and doing its work. There are respectable authorities certainly, such as *Richmond Turnpike Co.* v. *Vanderbilt*, 1 Hill (N. Y.) 480, and *Wright* v. *Wilcox*, 19 Wend. 343, which hold that, where the acts of a servant are wilful, the master is not responsible, even if they are done in the performance of his business, because such wilful acts are held to be a departure from the master's business.

These with many other authorities were carefully considered in *Howe* v. *Newmarch*, 12 Allen, 49; and it was there held, that, if the act of the servant was "done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner." The facts in that case, as reported, tended to show that a servant of the defendant, who was a baker, while pursuing the business of his master in driving from house to house and delivering bread, wilfully and intentionally drove his horse upon the plaintiff, by driving unlawfully upon the sidewalk against the plaintiff's remonstrance; and the instruction requested by the plaintiff, that "if at the time of the injury the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the plaintiff and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently, the plaintiff being in the exercise of due care himself," was deemed to have been stated with substantial accuracy.

The evidence offered in the present case somewhat resembles that in *Howe* v. *Newmarch*, *ubi supra*. The persons in charge of the steamboat which did the injury were the servants of the

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defendant, and the boat directed by them was upon one of her regular trips to Lowell when she struck the plaintiff's yacht. She varied her course before she reached the yacht, and immediately after the collision again varied it and kept upon her course. It presented enough, certainly, to be submitted to the jury, upon the inquiry whether the defendant's servants were not within the general scope of their employment, and whether, while accomplishing the business of the defendant, they had not done so wantonly and maliciously, and with a reckless disregard of the rights of others, by which the plaintiff had been injured in his property.

The case of *Howe* v. *Newmarch* has been since repeatedly recognized, and seems to us to express the true rule upon the subject to which it relates. *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117. *Levi* v. *Brooks*, 121 Mass. 501. *George* v. *Gobey*, 128 Mass. 289.

Upon the second count of the plaintiff's declaration, there should therefore be a *New trial.*

The case was argued at the bar, in November 1881, by *W. S. Knox*, for the plaintiff, and by *W. F. Gile*, for the defendant; and was submitted on briefs, in November 1882, by the same counsel.

David Crowell *vs.* Inhabitants of Beverly.

Essex. Nov. 8, 1882. — Jan. 9, 1883. C. Allen, Colburn & Holmes, JJ., absent.

In 1867, P., the owner of a parcel of land, opened and dedicated a private way over his land to a public street. In 1871, the town authorities laid a water-pipe under this way, and extended it in the same direction under the land of C., whose land adjoined that of P., and graded the land of C. for a certain width to another public street, and put up a sign designating the part thus graded as a private way. The way thus made was thereafter used by travellers. In 1874, P. sold to C. a strip of land five feet wide bounding in fact on the way dedicated by him, but describing it as bounded on his own land, without mentioning the way. In 1879, C. sold to S. this strip of land, and also a lot in the rear, describing the whole by one description, as bounding "by a way called S. Street." In 1880, the town laid out a town way over the land dedicated by P. and over C.'s land in the place where it had been graded in 1871. *Held*, on a petition by C. against the town to recover damages for the land so taken, that C. was estopped

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by his deed to S. to deny the existence of the way over his own land; and that the right of way of S. was an encumbrance which the jury might consider in estimating the value of the land taken by the town.

At the trial of a petition for the assessment of damages caused by the taking of land by a town, it appeared that the petitioner had conveyed a parcel of land to one S., bounding it upon a way, a part of which way ran over his own land and a part over the land of an adjoining owner, the latter part lying directly in front of the land granted. The judge instructed the jury, that the petitioner was estopped, so far as S. was concerned, from denying the existence of the way, and could not shut up the portion of the way which was upon his own land; that this would constitute an encumbrance on the land, which the jury might take into consideration in estimating the value of the land; and that "the description in the deed to S. was a covenant that there was such a way." *Held*, that the instruction was erroneous in stating that the deed operated by way of covenant, but that this error did not prejudice the petitioner; and that he had no ground of exception.

PETITION for the assessment of damages caused by the taking of the petitioner's land for a town way. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the petitioner was the owner of a tract of land bounding on Lathrop Street in the respondent town, extending back from said street three hundred feet or more in a northerly direction to land of one John Pickett; that over and across the petitioner's land and the land of Pickett the selectmen of the respondent town, in 1880, laid out a town way extending from Bartlett Street to Lathrop Street, for which damages were sought in this action; that, prior to the laying out of said town way, Pickett, in 1867, opened and dedicated a private way, forty feet in width, over his said land, extending back from Bartlett Street as far as the petitioner's land, and called the same a continuation or extension of Stone Street, which was a public street extending northerly from the opposite side of Bartlett Street; that Pickett sold lots upon said private way, and dwellings were erected upon said lots; that, in 1871, the selectmen of the respondent town, while laying through the streets the main pipes for the distribution of water, carried one of such pipes through the private way laid out by Pickett, and extended and continued the same across the petitioner's land, (which up to this time he had occupied as a flake-yard in his own business,) to connect with the main pipe on Lathrop Street, for the purpose of getting a better supply of water in

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that section of the town for household uses, and of equalizing the pressure; that in laying the pipes across the petitioner's land, in which he was not consulted nor his assent thereto obtained, except so far as his assent might be inferred from after knowledge and acquiescence therein, the selectmen removed the flakes therefrom, and were obliged to grade the land, to the width of about forty feet, in order to lay the pipes; that, after it was graded and the pipes laid, carriages and persons on foot passed over the petitioner's land, thus graded, from Lathrop Street, to and over the private way laid out by Pickett, to Bartlett Street, as over any public way, until the laying out of the street in 1880, which street was laid out over the same land graded by the selectmen for water pipes; that upon the petitioner's land, on Lathrop Street, which was about four feet above the grade of said street and had never been fenced, the selectmen, where they cut through and graded, at one time placed a sign, "Private way, dangerous passing."

For the purpose of showing that the land in question was encumbered by a right of way, and that the value of the same was thereby diminished, the respondent offered in evidence a deed from the petitioner to one Alden C. Stevens, executed in 1879, of a parcel of land, one of the boundaries of which was as follows: "Beginning at a corner at the east, thence running westerly fifty-three feet by a way called Stone Street." It was admitted that the petitioner did not own at the time of the conveyance, and never owned, the land lying south of the lot, and over which land said way extended, but that it was the property of Pickett; and that the portion of the lot which was sold to Stevens bounded on said way, and was purchased of Pickett in 1874 by the petitioner, the deed bounding it "southerly and westerly by my own land," and describing it as a strip five feet wide. It was also admitted that the petitioner never had any right of way or easement over Pickett's land, unless the deed from Pickett gave him such right or easement.

The petitioner asked the judge to rule that the deed to Stevens did not estop the petitioner from denying that there was such a way, called Stone Street, as described therein; that the petitioner not owning the land lying southerly of the premises sold to Stevens, described in his deed "as a way called Stone

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Street," there was no implied covenant that there was such a way, even if carriages and persons on foot passed over the same from Bartlett Street to Lathrop Street; and that no one except Stevens and those claiming under him had any right to take advantage of the covenant in the deed. But the judge declined to rule as requested, and instructed the jury that, if they should find upon all the evidence that, at the time of the conveyance to Stevens, there was a well-defined and graded way or street known as Stone Street, running from Bartlett Street to Lathrop Street and over the petitioner's land, upon which Stevens's lot bounded, then the description in the petitioner's deed to Stevens estopped him, so far as Stevens was concerned, from denying the existence of such way, and the description in the deed to Stevens was a covenant that there was such a way, and Stevens would have a right to go over the whole length, and the petitioner would be unable, as against Stevens, to shut up the portion of the street or way which was upon his own premises; that this would constitute an encumbrance upon the land when taken by the respondent; and that the jury might take it into consideration in estimating the value of the land, and might consider and determine how far such value was thereby diminished.

The jury returned a verdict for the respondent; and the petitioner alleged exceptions.

C. Sewall, for the petitioner.

J. A. Gillis, for the respondent.

MORTON, C. J. The deed from the petitioner to Stevens conveys a lot of land bounded "westerly fifty-three feet by a way called Stone Street." Under the instructions given them, the jury must have found that, at the time of this conveyance, there was a well-defined and graded way or street, known as Stone Street, running from Bartlett Street to Lathrop Street, partly over the petitioner's land and partly over land of Pickett. If the petitioner had owned the land covered by the way in front of the lot sold to Stevens, it is too clear to admit of any question that Stevens would have acquired, by estoppel, a right to the use of the way, at least over the petitioner's land, to its outlet at Lathrop Street. *Tobey* v. *Taunton*, 119 Mass. 404. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. *Howe* v. *Alger*, 4 Allen, 206.

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It appeared in this case that Pickett owned the fee of the land under so much of the way as lay directly in front of the Stevens lot, and for a few feet southeasterly; and that the petitioner owned the fee in the land covered by the way from Pickett's line out to Lathrop Street. The petitioner contends that this takes the case out of the general rule. We know of no decisions which require us to hold that, under such circumstances, a grantee will not acquire a right of way over the grantor's land so far as it extends. And, upon principle, there are the same reasons in such a case for an estoppel in favor of the grantee, as in the ordinary case where the grantor owns the land in front of the granted premises. This doctrine of estoppel rests upon the ground that, when a man sells another a lot of land bounded on a street, the existence of the street enters into the consideration and enhances the value of the land; by bounding upon the street, he represents that there is a street, and both parties understand that the grantee is to have, as appurtenant to his land, a right of way over such street. It would be a breach of good faith for the grantor to close up the street, or to do any act which would defeat the intention of the parties and prevent the grantee from enjoying the right of way impliedly granted, and he is therefore estopped from doing so.

In the case at bar, when Stevens bought his lot, undoubtedly the fact that it was bounded on Stone Street, an established and graded street, entered into the views of the parties and affected the consideration paid. It is to be presumed that he knew the state of the title, and that he could not use the way over the petitioner's land, unless, by grant from Pickett or otherwise, he could use the way over the street in front of his lot. But this did not destroy the value or convenience of the right of way over the petitioner's land. It is true that, if Pickett, or any other person not claiming under the petitioner, should obstruct or close up the way in front of the lot, Stevens would have no remedy against the petitioner; but he had the right to assume that the petitioner would keep his faith towards him, and that, having bounded him on a street running largely over his land, and thus assured him that there was such a street, and thereby induced him to buy, the petitioner would not close up the street or deny him the use of it.

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We are therefore of opinion that the petitioner by his deed to Stevens is estopped to deny that there is a way across his land; and that he granted by implication a right of way to Stevens from Lathrop Street over Stone Street so far as his land extended. This being so, the instructions given by the presiding justice of the Superior Court were substantially correct. He instructed the jury that the petitioner was estopped, so far as Stevens was concerned, from denying the existence of the way, and could not shut up the portion of the way which was upon his own land; and that this would constitute an encumbrance upon the land, which the jury might take into consideration in estimating the value of the land. The fact that the land taken by the town for a town way was subject to an easement or servitude which diminishes its value, is a proper ground for a reduction of the damages. *Tobey* v. *Taunton*, *ubi supra*.

The learned judge, probably through inadvertence, said also in his instructions that "the description in said deed to Stevens was a covenant that there was such a way." But this error could not prejudice the petitioner. In considering how much Stevens's right of way over the petitioner's land diminished the value of the land, it is quite immaterial whether, technically, the deed operates by way of estoppel or by way of covenant. In either case, the subject of inquiry, which is the right of way over the petitioner's land, would be the same.

Exceptions overruled.

JOHN SHAW, 2d, *vs.* HORACE D. HALL.

Essex. Nov. 8, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action for the price of a horse alleged to have been purchased by the defendant through an agent, there was evidence that the horse at the time of the alleged sale had been in the possession of the defendant for some days, and a horse of the defendant, which was part of the consideration of the trade, was in the possession of the agent; that on the morning of the alleged sale the horse was severely injured while being driven by the defendant; that the agent before this had bought horses for the defendant; that, on the day of the alleged sale, the defendant wrote a letter to the plaintiff, dating it at an early hour in

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the morning, in which he objected to the price asked, which letter there was evidence tending to show was in fact written after the horse was injured; and that, two days later, the defendant sent a telegram to the plaintiff, saying that he had disposed of his own horse and could not exchange, when in fact he had given the horse to the alleged agent. *Held*, that this evidence would not warrant a finding that the defendant had authorized the purchase of the horse by the alleged agent.

CONTRACT to recover the price of a horse alleged to have been purchased by the defendant through one Golden. Trial in the Superior Court, before *Wilkinson*, J., who ruled, upon the plaintiff's evidence, that the jury would not be authorized in finding that Golden had any original authority to buy the horse for the defendant, or that the defendant had so far ratified any unauthorized act as to be bound thereby; and directed a verdict for the defendant. The plaintiff alleged exceptions. The nature of the evidence appears in the opinion.

S. B. Ives, Jr. & R. E. Harmon, for the plaintiff.

B. F. Hayes, for the defendant.

DEVENS, J. At the trial, there was testimony that one Golden, assuming to act as agent for the defendant, had purchased the horse of the plaintiff; but the learned judge who presided was of opinion that there was no evidence of the authority of Golden thus to act, and therefore nothing to be submitted to the jury. We are to consider, therefore, not the weight of the evidence, but whether any evidence appeared which would have justified the finding that such authority existed.

The horse was in the possession of the defendant, and had been so for ten days, when Golden made the trade testified to by the plaintiff, while the mare of the defendant, which was to form a part of the consideration of the trade, was in that of Golden. On the morning of the day of the alleged trade, which was Monday, January 17, 1881, the horse was severely injured while being driven by the defendant.

The evidence that Golden had before this time bought horses for the defendant, and his statement that, whenever the defendant desired a horse, he, Golden, bought it for him, did not show any general agency on his part, and was entirely consistent with the defendant's claim that any trade made by Golden was subject to his approval. It was not, therefore, important upon the

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disputed question of Golden's agency to make on behalf of the defendant an unconditional trade.

The conduct of the defendant after the alleged trade is deemed by the plaintiff to afford evidence that he had authorized an unconditional trade, as the plaintiff testified it had been made by Golden. He wrote a letter, purporting to be written upon the same day and to be dated at 8 A. M., in which he objected to the price asked by the plaintiff. The evidence as to the time when this was first seen, and when it was received by the plaintiff, would have justified the jury in believing that it was in fact written after the defendant had been informed of a trade, whatever were its terms, and after the horse was actually hurt; and that it was a fabrication intended to appear to have been written before the horse was hurt. The telegram sent by the defendant, assigning as a reason for not trading that he had exchanged his own horse (the mare) so that he could not, when in fact he had given it away to Golden, as it would appear after the alleged trade and after the injury to the horse, justified a belief that he had thus intentionally provided himself with a reason for not carrying out that which he had agreed to do, and that he had secured the support of Golden therein by a valuable gift. But the fabrication of the letter, the false impression intended to be conveyed thereby, and the gift unexplained to Golden, while important in controlling the testimony given by himself and Golden, and as tending to show dishonest conduct and dishonest purposes on his part, do not afford affirmative evidence of an agency on the part of Golden, nor make out for the plaintiff this part of his case, on which it was essential he should offer evidence.

The plaintiff further contends, that, as the horse was in the defendant's possession from five to ten days and the mare in the possession of Golden the latter portion of the time, it might be fairly inferred that the trade had taken place; and the jury were not obliged to believe the explanations offered by witnesses whom they deemed discredited. A jury may without doubt believe that a certain state of facts exists, and that a certain inference may be fairly drawn therefrom, and may refuse to believe the explanations offered, even if the whole evidence comes from the same witnesses. This is only to say that they

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may believe some portions of the testimony, and reject others, as they respectively commend themselves to their judgment. But the plaintiff in the present case did not at the trial contend that the change in possession of the horses was evidence of a sale at that time. He relied solely, so far as the case shows, upon the bargain made between himself and Golden on January 17, some days thereafter, and, as Golden acted on behalf of another, it was for him to show Golden's authority.

We are therefore of opinion that the presiding judge correctly ruled that, upon this point, there was not evidence sufficient to be submitted to the jury. *Judgment on the verdict.*

JOHN J. MARSH & another *vs.* HAVERHILL AQUEDUCT COMPANY.

Essex. Nov. 8, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A deed to an aqueduct corporation, after reciting that the corporation proposed sinking an aqueduct from one point to another named, "to accomplish which it will be convenient to dig and lay logs through lands" of the grantors, provided that the grantors "bargain and agree that the above-mentioned aqueduct company or their agents shall have liberty to enter upon said lands for the purpose of digging and completing said aqueduct, and at all times thereafter to enter upon said lands when necessary to repair the same." *Held*, that the corporation might enter upon the land, and increase the size of its pipes or relay its pipes upon the line originally adopted, but that it could not lay or relay its pipes upon a new line differing from the original location, and was liable in tort for so doing. *Held*, also, that if by inadvertence or mistake, or under the belief that it had the right to do so, the corporation dug a new trench in a line differing from the former one, it did not thereby abandon or lose its easement, but, upon discovering its mistake, might relay its pipes upon the original line.

If an aqueduct company has the right to exercise certain rights in the land of a person by deed, and a statute is passed authorizing it to take land by the right of eminent domain, and it then does acts on the land in excess of the powers granted it by deed, a finding, in an action of tort brought against it by the owner of the land, that it did not act under the statute, renders the question of the constitutionality of the statute immaterial.

TORT for breaking and entering the plaintiffs' close in Haverhill, on November 1, 1880, and on divers days and times between that day and the date of the writ, October 18, 1881, and doing

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certain acts thereon. Trial in the Superior Court, without a jury, before *Pitman*, J., who found for the plaintiffs in the sum of $10; and the defendant alleged exceptions. The facts appear in the opinion.

B. B. Jones, for the defendant.

I. A. Abbott, for the plaintiffs.

MORTON, C. J. In the deed of Nathan Ayer and others, dated in 1803, under which the defendant justifies, after the recital "that whereas the Haverhill Aqueduct Company propose sinking an aqueduct from the Round Pond in said Haverhill to Haverhill bridge, to accomplish which it will be convenient to dig and lay logs through lands" of said Ayer and others, the grantors "bargain and agree that the above-mentioned aqueduct company, or their agents, shall have liberty to enter upon said lands for the purpose of digging and completing said aqueduct, and at all times thereafter to enter upon said lands when necessary to repair the same."

This granted to the defendant the right and privilege of laying a line of pipes across the land of the grantors in such direction as was convenient; but, having located the aqueduct, the defendant had not the right afterwards to change the location and carry it across other parts of the land. Upon this point, the case is governed by *Jennison* v. *Walker*, 11 Gray, 423, and *Chandler* v. *Jamaica Pond Aqueduct*, 125 Mass. 544.

In order to see the effect of this decision upon the rights of the parties, it is necessary to state the facts developed at the trial. After the deed, and up to 1842, the defendant maintained a four-inch log pipe on the premises, which the defendant then took up, replacing it by a six-inch iron pipe; in 1853, the defendant took up the six-inch pipe and laid in place of it an eight-inch iron pipe; in 1864, the defendant laid an earthen pipe in a new ditch, which the presiding judge found was in a position substantially different from the former; and in 1866 took up said earthen pipe and laid in place of it an eight-inch iron pipe. At various times between November 1, 1880, and the date of the plaintiffs' writ, the defendant entered upon the premises, took up the pipe laid in 1853, widened the trench and laid therein a twelve-inch cement pipe, and dug up and carried away the pipe laid in 1866, filling up the trench in which it had lain.

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These acts, committed between November 1, 1880, and the date of the writ, were the trespasses complained of. The acts of the defendant in 1864 and 1866, in laying and relaying its line of pipes in a location differing from the former one, were trespasses. The defendant had no right to lay or maintain them in this location, and therefore it had no right to enter upon the plaintiffs' land and dig it up on this line. For these acts of trespass the defendant is liable in this action, and, as the damages assessed were almost nominal, and as the bill of exceptions does not show that damages were assessed for any other trespasses, the exceptions must be overruled.

But we must not be understood as deciding that the acts of the defendant in increasing the size of its pipes, or in relaying its pipes upon the same line originally adopted, were illegal. The deed does not restrict the size of the pipe. It would seem to be entirely immaterial to the landowner whether it was four or twelve inches in diameter; and we are of opinion that the defendant had the right to enlarge its aqueduct to any reasonable extent which would not injure the landowners. We are also of opinion, that if the defendant in 1864, by inadvertence or mistake, or under the belief that it had the right to do so, dug a new trench in a line differing from the former one, it did not thereby abandon or lose its easement, but, upon discovering its mistake, might relay its pipes upon the line which by its grant it was entitled to follow.

The defendant asked the court to rule that the only remedy of the plaintiffs was under the St. of 1867, *c.* 73.* But, as the court found, as a fact, that the defendant did not act under the statute, and did not enter upon and take any land under it, it is clear that the statute has no application in the case. We need not, therefore, consider the question of its constitutionality, argued by counsel. *Exceptions overruled.*

* This statute authorized the Haverhill Aqueduct Company to take the waters of certain ponds to supply the inhabitants of Haverhill with water, and to take all lands necessary for laying and maintaining aqueduct pipes. It further provided, that all damages sustained by such taking should be determined in the same manner as in the case of land taken for highways; but contained no provision requiring a description of the land taken to be filed.

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EDWARD P. PARSONS *vs.* JAMES PHELAN.

Essex. Nov. 9, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If A. and B. make an oral contract, by which A. is to buy land by auction upon the joint account of both in equal shares, the contract is within the Gen. Sts. *c.* 100, § 19; *c.* 105, § 1; and, after the land has been conveyed to A., B. cannot maintain an action for a breach of the contract.

If a declaration alleges that the defendant agreed to bid for a parcel of land at a sale by auction, and buy one undivided half of the land in behalf of, and as agent for, the plaintiff, and the evidence is that the defendant agreed with the plaintiff to buy the land on their joint account, there is a variance.

MORTON, C. J. By the statute of frauds, no action can be brought upon a contract for the sale of lands, or of any interest in or concerning lands, unless the contract, or some memorandum thereof, is in writing. Gen. Sts. *c.* 105, § 1. And no trust concerning lands, except such as may arise or result by implication of law, can be created or declared, unless by an instrument in writing. Gen. Sts. *c.* 100, § 19.

In the case before us, the evidence tended to show that, in 1880, a parcel of land in Lynn was about to be sold by auction; and that the plaintiff and the defendant made an oral contract that the defendant should bid off and buy the estate upon the joint account of both parties, in equal shares.

It is clear upon the authorities that such a contract is within the statutes above cited; and that the plaintiff cannot enforce a trust in his favor in the land after it was conveyed to the defendant, or maintain an action at law for a breach of the contract. *Fickett* v. *Durham*, 109 Mass. 419. *Wetherbee* v. *Potter*, 99 Mass. 354. *Smith* v. *Burnham*, 3 Sumner, 435. This is the contract set out in the first count of the plaintiff's declaration, upon which the Superior Court properly ruled that he could not recover.

But the plaintiff contends that he is entitled to recover under his third count, which alleges that the defendant agreed that he would bid for and buy one undivided half of the land for and in behalf of the plaintiff, and as agent of the plaintiff. Without discussing the question whether this count sets out a contract which is not within the statute of frauds, it is enough for the

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decision of this case that there was not a scintilla of evidence to show any such contract. On the contrary, the testimony of the plaintiff, which was the only evidence in the case as to the terms of the contract, clearly shows that it was, as set out in the first count, that the defendant should buy the estate offered for sale on joint account, and it is susceptible of no other construction.

Though the effect of the contract which was made, if it had been in writing, would be that the plaintiff would become the equitable owner of an undivided half of the estate, this does not change the contract into a contract to buy an undivided half as the agent of the plaintiff. To declare upon the contract as such creates a variance, and is a mere evasion of the statute.

The court should have instructed the jury as requested, that the contract proved was within the statute, and that the plaintiff could not maintain his action. *Exceptions sustained.*

C. P. Thompson & T. M. Osborne, (*H. F. Hurlburt* with them,) for the defendant.

S. B. Ives, Jr., (*R. E. Harmon* with him,) for the plaintiff.

WILLIAM B. BATES, administrator, *vs.* ATKINS H. BATES.

Essex. Nov. 9, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A testator provided in his will for the erection of a monument in memory of himself and his wife, at a cost named. His wife left a will, which, after giving several specific legacies, contained the following residuary clause: "My house and furniture, silver plate, fixtures and everything to be sold, if there should not be enough from my husband's estate for a monument, I wish to have my money expended for a monument of granite, ... if there should be money enough left from my husband's estate. I want a memento of Hope, Faith and Charity, the expenses to be taken from my own estate, and his name cut on the steps, the remainder left I wish it to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through." *Held*, that the testatrix intended to direct that her house and other property should be sold for the purpose of erecting the monument provided for by her husband's will with the proceeds, in case his estate should not be sufficient for that purpose; that, in case there was money enough for that purpose from his estate, a memento was to be erected, at the expense of her own estate, which was to

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be a design of Hope, Faith and Charity, upon which her husband's name was to be cut; and that the remainder of her property was to be held in trust to beautify and keep in order the monument.

A provision in a will, establishing a fund for the preservation, adornment and repair of a private monumental structure, creates a perpetuity for a use not charitable, and is void.

A right, given by a will, to sell property for an object which cannot be accomplished, cannot itself be exercised.

DEVENS, J. The question in this case arises upon an alleged breach of contract by the defendant, in declining to accept a conveyance from the plaintiff of a certain house and land in Salem, which he had in writing agreed to purchase for a fixed sum, upon receiving a satisfactory deed thereof. The deed tendered is in proper form, and duly executed by the plaintiff, as administrator with the will annexed; but the defendant denies that the plaintiff has the right to sell the said real estate in his capacity as administrator, and asserts that the instrument tendered does not convey a good title. The right of the administrator to sell the real estate, which was a part of that of which Mrs. Hannah M. Johnson died seised, depends upon the residuary clause of her will, which has been admitted to probate. Her husband, William O. Johnson, had died before her, and by his will had provided for the erection of a monument in memory of himself and his wife, at an expense of $3500. The sum of $3000 was to be expended for the monument, and $500 to be retained in the hands of trustees. This monument has since been constructed, substantially like that described in the will of Mrs. Johnson, at an expense of about $3000, from the funds of the husband's estate, and the sum of $500 remains in the hands of the trustees named in his will for its repair, and for beautifying the lot upon which it stands, which is more than sufficient for that purpose.

In regard to this bequest, no question is presented, and it is only to be considered as it may bear upon the interpretation of Mrs. Johnson's will. This was apparently made when some uncertainty existed whether her husband's property would be sufficient to provide for all his bequests. After bestowing a large number of specific legacies, the residuary clause occurs, which, as written and punctuated, is quite unintelligible. If mere changes in punctuation will make that intelligible which otherwise is not so, and if the meaning thus evolved is apparently in

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accordance with the general phraseology of the will, or the sentence in which it is found, it may be safely adopted.

The residuary clause is as follows: "My house and furniture, silver plate, fixtures and everything to be sold, if their should not be enough from my husband's estate for a monument, I wish to have my money expended for a monument of granet with four pillows like one in the grove, only larger, if their should be money enough left from my husband's estate. I want a momento of Hope, Faith and Charity, the expences to be taken from my own estate, and his name cut on the steps, the remainder left I wish it to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through."

Without any changes in punctuation, a general design may be seen here to direct her house, &c. to be sold for the purpose of erecting the monument provided for by her husband's will with the proceeds, in case his estate should not be sufficient for that purpose, except that it is to be larger than the monument to which reference is made for a description; that in case there is money enough for that purpose from her husband's estate, a memento is to be erected at the expense of her own estate, which is to be a design of Hope, Faith and Charity, upon which memento her husband's name is to be cut; and that the remainder of her property is to be kept in trust to beautify and keep in order the monument. The residuary clause may, without changing, transposing or introducing words, be read intelligibly by altering punctuation and orthography only, thus: "My house, furniture, silver plate, fixtures and everything to be sold. If there should not be enough from my husband's estate for a monument, I wish to have my money expended for a monument of granite with four pillars like the one in the grove, only larger. If there should be money enough left from my husband's estate, I want a memento of Faith, Hope and Charity, the expenses to be taken from my own estate and his name cut on the steps: the remainder left I wish it to be kept in trust to beautify and keep the *it* in good order." We cannot doubt that the pronoun "it" in the last line refers to the monument or the memento, whichever should be erected by her estate. The residuary clause concludes with the words, "I wish this to be carried strictly through."

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The language by which the testatrix provides that her house, furniture, &c. are to be sold, is in substance a direction that such a sale shall be made by the executor of her will. Followed immediately, as it is, by the expression of her wish that her money shall be expended in a particular way, it is shown that she intends that the property named by her is to be turned into money, in order that the money thus raised should be expended for the purposes stated by her. If these purposes for any reason cannot be carried out, the right to sell given by the will ceases. The object for which the power was given must exist in order that the right to exercise it may exist. If one by his will should charge a pecuniary legacy upon a specified piece of real estate, and should direct his executor to sell such piece to satisfy the legacy, if the legacy were to lapse, the power to sell would fail. The scheme of the testatrix was in part to erect a monument, or, if that should be accomplished at the expense of the estate of her husband, then a memento, as she terms it.

The monument was erected at the expense of the husband's estate, and, as the facts agreed show, the erection of the memento has already been accomplished: for that purpose it is not now necessary to sell the real estate. It will not be important, therefore, to consider whether this provision could be separated from that which provides for the sale of the real estate, in order to constitute a permanent fund for beautifying and keeping it in order, to which the remainder, after erecting the monument or memento, was to be devoted. Funds cannot be established indefinitely inalienable in the hands of those to whom they are entrusted, and their successors, the income of which is to be perpetually devoted to uses which are not, legally speaking, charitable. To charities the rule of public policy which forbids this does not apply. *Odell* v. *Odell*, 10 Allen, 1. That the testatrix sought to create a fund in perpetuity for the beautifying and keeping in repair the monument or memento clearly appears, and the inquiry therefore is whether this is a charitable use.

The St. of 43 Eliz. *c.* 4, so far as it recognizes, defines or indicates what are charitable uses, has frequently been held to be a part of our common law. *Earle* v. *Wood*, 8 Cush. 430, 445. In determining what are charitable uses, we are not limited by the

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enumeration of them as contained in that statute, which is an attempt to show by familiar examples what classes or kinds of uses are to be considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than a complete specification of them. *Drury* v. *Natick*, 10 Allen, 169. But, that it may be charitable, the use must be of such a character that the general public is to have the advantage of it, and not merely individuals. In *Giles* v. *Boston Fatherless & Widows' Society*, 10 Allen, 355, where a gift had been made to a charitable society upon condition that it should keep the tomb of the testator in repair, it was remarked that it might well be doubted "whether this condition to maintain a private tomb or burial-place was not void, as tending to create a perpetuity." It was not thought necessary there to decide the question; because, if void, it did not defeat the gift, and, if valid, it had been sufficiently complied with. But an examination of the authorities there cited, with others, will show that it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial-place could not be treated as a public charity and thus made perpetual, and that such bequest would be void. *Durour* v. *Motteux*, 1 Ves Sen. 320. *Doe* v. *Pitcher*, 6 Taunt. 359, 370. *Lloyd* v. *Lloyd*, 2 Sim. (N. S.) 255, 264. *Rickard* v. *Robson*, 31 Beav. 244. *Fowler* v. *Fowler*, 33 Beav. 616. *Carne* v. *Long*, 8 W. R. 570. *Mellick* v. *Asylum*, Jacob, 180.

No distinction between these cases and that at bar can be made favorable to the latter. The repair of a private monumental structure is a matter strictly individual and personal. The fund constituted by the testatrix is to be expended for her own gratification, upon an object in which the public has no interest, and which has no proper similitude to a charitable use. "It stands," as the Master of the Rolls remarks in *Mellick* v. *Asylum*, *ubi supra*, "on the same footing as an expensive funeral."

The statutes of Massachusetts have permitted cemetery corporations to hold money in trust to apply the income to the care, preservation or embellishment of any lot or its appurtenances. Where towns have provided cemeteries, they have also been permitted to receive money to the amount of five hundred dollars

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for the care and preservation of a lot held by any individual. Pub. Sts. *c.* 82, §§ 8, 17.

These statutory provisions have here no application. The provision in the testatrix's will, establishing a fund for the preservation, embellishment and repair of the monument or memento erected by her, is therefore void, as it seeks to create a perpetuity for a use not charitable. The right to sell, having been given for an object which cannot be accomplished, cannot itself be exercised. The result is that the plaintiff has not made a good title to the defendant by his deed.

Judgment for the defendant affirmed.

J. A. Gillis, for the plaintiff.

W. H. Gove, for the defendant.

MILON S. JENKINS *vs.* JOHN T. WOOD, executor.

Essex. Nov. 9, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A creditor, who recovers a judgment against an executor, in an action upon a debt due from the testator, brought within the two years limited by the Gen. Sts. *c.* 97, § 5, is not entitled, the execution issued on the judgment not being satisfied, to bring an action upon the judgment after the expiration of the two years, although the bond given by the executor, who is also residuary legatee, is one conditioned to pay debts and legacies.

CONTRACT upon a judgment recovered by the plaintiff against the defendant, as the executor of the will of Abigail Barker, in an action on a debt due from her. Writ dated June 8, 1881. At the trial in the Superior Court, before *Pitman*, J., without a jury, the case was submitted upon agreed facts, in substance as follows:

Abigail Barker died in August 1877, leaving a will, in which the defendant was named executor and residuary legatee. The will was duly proved, the defendant was appointed executor and gave a bond conditioned to pay all debts and legacies, and took the entire estate. The defendant duly published notice of his appointment, and no further proceedings were had in the Probate

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Court. The estate of the testatrix at her decease consisted of certain land in Boxford, and bank stocks.

On December 28, 1878, the plaintiff brought an action against the defendant as executor to recover a debt due from the testatrix, and, at September term 1879 of the Superior Court, recovered judgment therein. Execution duly issued upon this judgment, and was placed in the hands of an officer, who made demand upon the defendant for sufficient goods or property of the testatrix to satisfy the same; and, the defendant refusing to satisfy said execution, it was in part satisfied by a sale of certain real estate of the testatrix, and so returned to court. Thereupon an action was brought by the plaintiff against the defendant, as executor, upon his bond, and judgment was rendered in favor of the plaintiff, and execution issued for the amount of the penal sum of the bond, which amount was paid and applied in part satisfaction of the original judgment. The present action was then brought, in which an attachment was made of certain personal property as the property of the testatrix in the hands of the defendant as executor; but there was no evidence offered, or admission made, that this was the property of the testatrix. The estate was never represented insolvent, and no insufficiency of assets was set up in the original action, but it was tried upon its merits.

More than two years elapsed after the defendant was appointed executor, filed his bond and published notice of his appointment, before the date of the writ in the present action.

Upon these facts, the judge found for the plaintiff, and ordered judgment accordingly; and the defendant alleged exceptions.

C. G. Saunders, for the defendant.

W. S. Knox, for the plaintiff.

DEVENS, J. It is contended that the special statute of limitations in favor of executors, by which it is provided that actions against them shall be brought by any creditor of the deceased within two years from the time of giving bond for the discharge of their trust, does not apply to this case. Gen. Sts. *c.* 97, § 5. But the plaintiff was not the less a "creditor of the deceased" because he had obtained a judgment against the defendant as executor. On such a judgment the execution to be issued was *de bonis testatoris* and not *de bonis propriis*, and

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it is as such creditor that he has attached personal property claimed to be that formerly of Abigail Barker, the defendant's testatrix, although he has failed to offer any evidence that it was so. It was not intended that suits should be brought after two years, even upon judgments recovered in suits which had been begun before the expiration of that time. The language of the statute is general, and many of the reasons why a limitation of actions is desirable would apply to suits upon judgments recovered subsequently to the death of a testator, as well as upon previously existing causes of action. If the plaintiff failed to obtain satisfaction upon the execution which had issued upon his judgment, and if property of the testatrix existed upon which he had a right to levy, an ample remedy existed for him by *scire facias*, upon which a new execution could have been obtained. Gen. Sts. *c.* 133, §.17.

Nor does the fact that the bond given by the executor was not in the ordinary form, to account and faithfully administer, &c., but one to pay debts and legacies, entitle the plaintiff to maintain the action without regard to the statutory limitation. Gen. Sts. *c.* 93, §§ 3, 4.

The comprehensive words of the statute in prescribing the limitation, "no executor or administrator," include one who, being also residuary legatee, has given a bond to pay debts and legacies, as well as one who has given a bond in the ordinary form. *Troy National Bank* v. *Stanton*, 116 Mass. 435. *Thompson* v. *Brown*, 16 Mass. 172. *Holden* v. *Fletcher*, 6 Cush. 235.

The present action is not one against the executor personally, but against him as the representative of the estate of the testatrix. It is upon a judgment founded upon a contract made by her, and should a new judgment here be rendered, it must be like that which preceded it, *de bonis testatoris*. The questions whether the defendant became liable upon his promise for the debts of the deceased without regard to the amount of the assets, and whether the bond given by him, as well as any other remedies the creditor might have, are to be treated as simply collateral thereto, and whether such a liability (if it exists) must be enforced within the two years, are not now before us.

Exceptions sustained.

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MARY SHAPLEIGH *vs.* MERRILL WYMAN.

Essex. Nov. 9, 1882. — Jan. 9, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action for personal injuries occasioned to a woman sixty-seven years old, by being knocked down by a horse and wagon, while crossing a street on some flagstones at a point where the street forms a junction with two other streets, all much travelled, in the compact part of a city, the fact that, before attempting to cross and while crossing, she did not look up or down the street but straight ahead, is not conclusive evidence of a want of due care on her part; but the question is rightly submitted to the jury.

TORT for personal injuries. Answer, a general denial. Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that she was sixty-seven years old; that on November 24, 1881, about three o'clock in the afternoon, she passed down the southerly side of Granite Street in Haverhill to certain flagstones, which were shown by a plan put in evidence to be located at a point where Granite Street, Essex Street and Locust Street form a junction; that she saw nothing in her way, and stepped on the flagstones, with the intention of passing over to Locust Street; that when she got half-way across Essex Street, while on the flagging, she felt the wheel of the plaintiff's carriage strike her on the right arm; and that she was then thrown down and injured by the wheel. On cross-examination, she testified that, when she reached the flagging, she looked straight ahead; that she did not look up or down Essex Street, but followed the flagging, looking straight ahead; that she did not see the defendant's horse or wagon before she was struck, and did not know which way it came from; that there was nothing to prevent her looking up and down Essex Street; and that it was not her business to do so. This evidence of the plaintiff with regard to the care she used before she stepped on the flagging, and while on the same, was not modified or contradicted by any evidence in the case.

The plaintiff further testified that she was in company with a woman seventy-eight years old, who stepped on the flagging with her, but who had reached the other side of the street by the time the accident occurred.

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Granite, Essex, Locust and Wingate Streets are much travelled streets in the compact part of Haverhill. The defendant drove down Wingate Street, and then up Essex Street to the flagging, where the accident occurred. Wingate Street runs parallel to Granite Street, and enters Essex Street on its westerly side about one hundred and fifty feet south of Granite Street. Evidence was introduced on both sides as to the care or negligence of the defendant, but there was no evidence that he intentionally ran into the plaintiff.

At the close of the plaintiff's evidence, the defendant asked the judge to rule that there was no evidence of due care on the part of the plaintiff. But the judge ruled that the question of due care on the plaintiff's part was for the jury; and the defendant excepted. The defendant then introduced the evidence of care on his part; and asked the judge to rule that the plaintiff was not entitled to recover. The judge refused so to rule; and instructed the jury that if the plaintiff, while in the exercise of due care, was injured by reason of the defendant's negligence, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

B. B. Jones, for the defendant.

W. H. Moody, for the plaintiff.

DEVENS, J. We have heretofore held that the decisions as to the degree of care required at a railroad crossing do not afford a proper test of the care which is demanded of one, who, in passing from one side to the other of a public street or way, must necessarily have suitable regard to the vehicles lawfully travelling thereon. The same degree of watchfulness is not required as when a railway train, which is usually run at a higher rate of speed, and is confined to a track from which it cannot deviate, and cannot be checked suddenly, except with difficulty and hazard, has a right to use a particular portion of the highway. *Lynam* v. *Union Railway*, 114 Mass. 83. *Bowser* v. *Wellington*, 126 Mass. 391.

The mere fact that the plaintiff did not look up or down Essex Street, but straight ahead, when she stepped upon the flagging stones to cross, is not conclusive of a want of due care on her part, which contributed or may have contributed to the

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accident. *Williams* v. *Grealy*, 112 Mass. 79. *Schienfeldt* v. *Norris*, 115 Mass. 17. Had she done so, it does not appear that she could have seen the vehicle by which she was injured, nor indeed that it was in Essex Street at the time. The fact that her companion, a woman of seventy-eight years of age, (she herself being sixty-seven,) had already reached the opposite side of the street when the injury occurred, tended to show that she had not rashly undertaken to cross.

Nor was the circumstance that, at the time the plaintiff was struck, she was not looking "up or down Essex Street, but followed the flagging, looking straight ahead," conclusive against her. In the most carefully kept streets, the slipperiness produced by the damp mud brought by their use upon the flagstones may often be such as to require for the time being the whole attention of the traveller, especially if she be a person somewhat advanced in years.

The question of due care on the part of the plaintiff was therefore properly submitted to the jury.

Exceptions overruled.

ABBY C. FOSTER *vs.* JOSEPH E. FOSTER.

Essex. Nov. 10, 1882. — Jan. 9, 1883 C. ALLEN, COLBURN & HOLMES, JJ., absent.

A bill in equity, for an account, alleged that the plaintiff and the defendant were administrators of an estate, and had given a joint bond; that they, with a third person, were the only next of kin of the intestate; that the estate had been settled in the Probate Court, and the defendant had failed to include in the inventory and account certain assets of the estate in his possession; that the plaintiff had assented to the final account, and had receipted for his interest, upon the defendant's agreeing that this should not prejudice the plaintiff's right to his share of the assets in question; and that the third person had been paid his share. *Held*, on demurrer, that the bill could not be maintained.

DEVENS, J. The plaintiff, the defendant and their brother, Larkyn J. Foster, were the sole heirs and next of kin of Benjamin Foster. The plaintiff and the defendant jointly administered upon their father's estate, which has now ostensibly been

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settled by the Probate Court, the inventory and accounts having been rendered and the assets divided. The plaintiff alleges in this bill in equity, that the defendant has failed to inventory and account for two bonds, of the value of $500 each, which were of the estate of Benjamin Foster and came to his possession, and to one third of which, or the value of which, she is entitled. She avers that she assented to the final account of the estate, and receipted for her interest, upon the agreement that she should not thereby prejudice her right to her share of these bonds or of their value; that she is entitled thereto, and has not received either, although her brother Larkyn J. has been paid by the defendant one third of their value. The prayer of the bill is, that the defendant shall be ordered to account for these bonds as a part of the estate of said Benjamin Foster, so that she may be able "to receive her share thereof as an heir as aforesaid;" and also, but as an alternative prayer, that the defendant be ordered to pay the plaintiff the sum found due as her share of the bonds aforesaid. She contends that the defendant holds this property in trust for her, and that he is bound here to account for it. The bill does not aver that he ever agreed so to hold it, although it avers that he assured her that her signature to the final account and her receipt should not prevent her from making this claim, and that she should not be concluded by such assent. The bill also avers that the defendant denies having had the bonds in question, and on his part asserts that she is not entitled to anything more than she has already received as her share of the estate of her deceased father. To this bill the defendant has filed a demurrer.

As framed, the bill seeks to transfer to this court the settlement of the account of the defendant from the Probate Court, which has ample jurisdiction to redress the matters of which the plaintiff complains. If it was the duty of the defendant to have accounted for these bonds as a part of the estate of the intestate, he could have been cited before that court and ordered so to do. Gen. Sts. *c.* 96, § 6. If the plaintiff was dissatisfied with the decision there, she could have appealed to this court. The receipt given by the plaintiff was certainly not conclusive against her, under the circumstances alleged as the inducement to her signing it. Even where an administrator produces receipts from

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all the heirs, acknowledging that he has paid them their distributive shares in full, such receipts may be explained or controlled by other evidence. *Bard* v. *Wood*, 3 Met. 74. The executor is bound by his general duty, not only to make oath to the truth and correctness of his account, but to answer specifically as to all facts within his knowledge, whether affecting his own rights or claims, or those of others. Gen. Sts. *c.* 98, § 9. *Stearns* v. *Brown*, 1 Pick. 530.

Where an account has been settled, it is also competent for the Probate Court to open it, upon a proper case made by petition, for the purpose of correcting any mistake as to any matter which it has not so passed upon and decided that an appeal can be claimed to this court. *Stetson* v. *Bass*, 9 Pick. 27. It cannot decide that an account of an administrator is final, so that no further inquiry can be made as to matters not properly included in such account, nor can it thus oust itself of its appropriate jurisdiction. *Field* v. *Hitchcock*, 14 Pick. 405. Gen. Sts. *c.* 98, § 12.

It is in the Probate Court that the accounts of the two administrators must be adjusted in order to determine whether, even if these bonds should have been inventoried and accounted for, any sum should be ordered to be paid to the plaintiff. We have no means of ascertaining this. An investigation there can alone determine what she has already received, and what she is entitled to receive.

In seeking to maintain this bill, the argument of the plaintiff is, that, by reason of having given a joint bond with the defendant for faithful administration, she would be without remedy unless it is thus afforded. This is erroneous. If, before the Probate Court, it were proved that the defendant had two bonds belonging to the estate of the intestate, for which the plaintiff, as one of the next of kin, was entitled to have him account, and he failed so to do, or if, having accounted for them, he failed to pay them over or divide them as ordered by the Probate Court, it would be the duty of that court to remove him from his position. Gen. Sts. *c.* 101, § 2; *c.* 96, § 6. Pub. Sts. *c.* 132, § 14; *c.* 133, § 1. When thus removed, he might be sued by the remaining administrator, as might any other person wrongfully holding property of the intestate. Upon recovery, if the

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plaintiff were entitled to the avails of the suit, she could receive them and appropriate them to her own use, if such should be the decree of the Probate Court.

The bill rests upon an alleged failure of the defendant to perform his duties as administrator. This court, in the exercise of its original jurisdiction, is not the appropriate tribunal for the inquiry. *Bill dismissed, with costs.*

C. A. Benjamin, for the plaintiff.

H. P. Moulton, for the defendant.

NOEL BIGAOUETTE *vs.* HENRY PAULET.

Suffolk. Nov. 13, 1878; Sept. 15, 1881. — Jan. 3, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A husband may maintain an action for the loss of the *consortium* with his wife, against a person who has criminal conversation with her, whether such conversation is with or without her consent, and although the act caused no actual loss of her service to him.

TORT in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society and benefit. Writ dated April 9, 1877. Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions, in substance as follows:

The only witnesses were the plaintiff and his wife. The wife testified that the plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under the defendant, and that the parties were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, the defendant told the plaintiff's wife that he would turn her husband away from the factory if she refused to receive the defendant's visits; that on July 5, 1876, the defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was

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born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and the defendant, and three days afterwards the plaintiff was discharged from the factory by the defendant; that shortly after July 5, 1876, the plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family from the time of the assault up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of a loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar, in November 1878, by *A. Russ & H. B. Sargent, Jr.*, for the plaintiff, and by *W. P. Harding*, for the defendant; and was afterwards submitted on briefs by the same counsel.

W. Allen, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*, — the right to the conjugal fellowship of the wife, to her company, coöperation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband

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actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the others, the author's words are, "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers* v. *Caulfield*, 6 East, 244; *Wilton* v. *Webster*, 7 C. & P. 198; *Yundt* v. *Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed, — in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife, of comfort in her society in that respect in which his right

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is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut* v. *Gallisard*, 7 Mod. 78; 2 Ld. Raym. 809; Holt, 50. See also Bac. Ab. Trespass, C, 1; and Marriage, F, 2; 2 Chit. Pl. (13th Am. ed.) 855. Reeves Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind, — that the corrupting of the body rather than the mind of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the *consortium* with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

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J. R. MAY & another *vs.* L. B. WARD.

Suffolk. Nov. 11, 1881; Nov. 14, 1882. — Jan. 6, 1883. W. ALLEN & HOLMES, JJ., absent.

A contract in writing signed by the defendant, a manufacturer of sheet-iron, was as follows: "I hereby agree to ship you balance of twelve cars sheet-iron which we owe you on a previous arrangement, same to be agreed upon at prices and terms as below and specification not to exceed one car of heavy sizes heavier than twenty-one gauge and not more than one car of thirty gauge. Balance of specification to be No. 21 to No. 26 gauge, all specifications to be sent us at rate of one car-load per month." Then followed a list of prices for different sizes per one hundred pounds, and terms of payment. *Held*, in an action thereon, in which it appeared that the iron to which the contract related was of greater value than $50, that the contract was for the sale of goods, and not for labor and materials; that oral evidence was inadmissible to show how many cars were meant; that there was no sufficient memorandum in writing, within the Gen. Sts. c. 105, § 5, even as to two car-loads; and that the action could not be maintained.

CONTRACT for the refusal of the defendant to perform his part of the following contract in writing, dated February 7, 1879, signed by the defendant, and accepted by the plaintiffs:

"I hereby agree to ship you balance of twelve cars sheet-iron which we owe you on a previous arrangement, same to be agreed upon at prices and terms as below and specification not to exceed one car of heavy sizes heavier than twenty-one gauge and not more than one car of thirty gauge. Balance of specification to be No. 21 to No. 26 gauge, all specifications to be sent us at rate of one car-load per month. Specification for each car to be sent from 1st to 10th day of each month, commencing from above date.

"No. 10 to No. 16	Common	Annealed	Sheet Iron	.	2 30	per	100 lbs.	f O B Cars Boston Mass
No. 17 to No. 20	"	"	"	.	2 40	"	"	
No. 21 to No. 24	"	"	"	.	2 50	"	"	
No. 25 to No. 26	"	"	"	.	2 70	"	"	
No. 30	"	"	"	.	3 70	"	"	

"Terms net cash subject to sight draft on receipt of each invoice and bill of lading by mail. Above to be shipped in your name. Should you refuse to pay any or either of our sight drafts made for any of above shipments then we should consider above contract null and void."

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Answer, the statute of frauds. Trial in the Superior Court, before *Colburn*, J., who reported the case for the determination of this court, in substance as follows:

The plaintiffs were dealers in sheet-iron, in Boston, and the defendant was a manufacturer of such iron, in the State of Ohio. It was agreed at the trial that the iron, to which the contract relates, was of greater value than $50. The plaintiffs offered to show, by the conversation that occurred at the time this contract was made, that the contract related to six cars; but the judge ruled that it was not competent to show this by parol. They then contended that the contract should be construed as an agreement to furnish twelve cars of iron, or two or three cars of iron. But the judge ruled that the contract did not require the defendant to furnish twelve, or any other definite number of cars of iron; and ordered a verdict for the defendant.

If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict to be set aside, and a new trial ordered.

The case was argued, in November 1881, by *S. C. Darling*, for the plaintiffs, and by *L. L. Scaife*, for the defendant; and was reargued, in November 1882, by the same counsel.

C. ALLEN, J. 1. This was a contract for the sale of goods, and not for labor and materials.

2. It was not competent to show by oral testimony how many cars were meant. All the essential terms must be contained in, or ascertainable from, the writing.

3. The memorandum does not contain all the essential terms of a sale, but is left incomplete and uncertain. The words "same to be agreed upon" show that one element was to be agreed upon in the future. The plaintiffs contend that the writing shows that at least two car-loads were to be shipped, and that the action may be maintained to recover for the failure to deliver at least that quantity. But the promise specified is, to ship a balance "to be agreed upon," and is limited to such balance, and is not enlarged by the following stipulations, which are provisional, and dependent upon a previous determination by agreement. Till such determination, there is no agreement. The construction of the contract in this respect is the same as if

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the words were "the same to be determined by the award of A. B."; in which case, until such award, the contract would not take effect. *Judgment on the verdict.*

NORWAY PLAINS SAVINGS BANK *vs.* JOSEPH B. MOORS.

Suffolk. Nov. 15, 16, 1882. — Jan. 9, 1883. W. ALLEN, J., absent. HOLMES, J., did not sit.

A. made a contract with B., by the terms of which B. was to execute a mortgage of land to a bank, and to give to A. an order on the bank for the money obtained by means of the mortgage, and to build houses on the land in a specified manner and complete them within a certain time. A. was to advance money from time to time to B., according to the progress and quality of the work, and to retain the money received from the bank as collateral security for the money advanced by him, and for interest and commissions. The bank had previously agreed to lend B. the money, taking a mortgage as security. A. then made a contract with the bank, which, after reciting these facts, and stating that the money was to be paid A. as the work progressed, contained a covenant on the part of A. that the houses should cost not less than a certain sum each, and that B. should "complete and finish" the houses in a good and workmanlike manner. At the time this contract was made, the foundations of the houses had been put in, but the agents of the bank had no knowledge of their condition. *Held*, that A. was liable to the bank for any loss caused to it by reason of the foundations being put in in an unworkmanlike manner.

A bank took from B. separate mortgages on several lots of land, and entered into a contract with A., by which A. agreed that the houses to be built upon the land should cost a certain sum each, and be built in a good and workmanlike manner. The bank agreed, upon A.'s request, to assign to him any or all of the mortgages, upon receiving from him full payment of the sums advanced thereon and interest. *Held*, that it was no defence to an action by the bank against A., for breach of the contract as to the remaining parcels, that the bank, before any demand by A. for a transfer of the mortgages, had sold one of the parcels of land, under the power contained in the mortgage of that parcel.

A. made a contract with a bank, which, after reciting that the bank was about to lend to B. a certain sum of money upon mortgages of certain lots of land and buildings in process of erection and to be erected thereon, and that B. had given A. an order on the bank for the money, contained a covenant on the part of A. that B. should complete the houses in a workmanlike manner at a certain cost each, and a clause whereby A. further guaranteed that the houses should be finished within a certain time; and that A. might, for his security, take from the bank an assignment of the mortgages, on paying the sums due thereon and interest. The foundations of the houses were defective to A.'s knowledge, and the houses did not cost as much as it was agreed that they should cost. The bank, in ignorance of these facts, made the last payment it had agreed to make, and subsequently agreed to surrender the contract if there were no liens on the

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property. The bank did not surrender the contract. At both of these times the property was of sufficient value to save the bank harmless, and to indemnify A. if he had taken the mortgages. *Held*, in an action by the bank against A. for breach of the contract, that A. was not a mere guarantor, and that the acts of the bank did not constitute such laches as would prevent it from recovering for defects in the foundations.

If a bank lends money on a mortgage of land and houses to be built thereon in a workmanlike manner, and at a certain cost each, and a third person covenants with the bank that the houses shall be so built, in an action by the bank against such third person the measure of damages is so much of the difference between the value of the houses as built and their value if built according to the contract, as is sufficient with the value of the houses as built to pay the mortgage debt and interest at the time the houses were finished, or as soon afterwards as the bank had notice of the defects, or might have had notice with the exercise of reasonable diligence.

CONTRACT for breach of the following agreement, under seal, dated July 1, 1871, and executed by the plaintiff, as the party of the first part, and by the defendant, as the party of the second part: "Whereas the party of the first part is about to loan to H. F. Rice and J. Q. Hanson the sum of fifty-eight thousand dollars, upon eleven different mortgages of eleven different lots of land and buildings in process of erection and to be erected thereon; and whereas it is proposed that a large part of said sum is to be advanced on said mortgages before the completion of said houses; and whereas the said Rice and Hanson have given to said Moors an order for the payments of the amounts so to be paid by said corporation as the same shall become due: Now, therefore, in consideration of the premises and the covenants of said Moors hereinafter contained, said party of the first part covenants and agrees with said Moors and his assigns, that it will, upon his request, advance and pay to him, the said Moors, from time to time, according to the schedule of payments hereto annexed, such amounts as he shall require on account of said loan of fifty-eight thousand dollars, until the whole sum of fifty-eight thousand dollars shall have been paid to him; and said Moors, in consideration thereof, covenants and agrees with said party of the first part, that said Rice and Hanson shall complete and finish, as soon as may be, in good, workmanlike manner, and with all reasonable diligence, said eleven houses, three of which, mortgaged each for six thousand dollars, shall cost not less than ten thousand each, and the other eight, mortgaged each for five thousand dollars, shall cost not less than nine thousand

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dollars each, and that all mechanics' or other liens shall be discharged within forty days after the same are completed; and said Moors further guarantees said corporation that said houses shall be completed within one year from the date hereof. It is further agreed by and between the parties, that if said Moors should deem it necessary to his own security to take an assignment of said notes and mortgages, or any of them, the said corporation will, upon his request and at his own proper cost, assign and transfer to him any or all of said mortgages and the several notes for the security of which they were given, upon receiving from him, the said Moors, full payment of the several sums advanced thereon, with all accrued interest. Said land is situated on West Clarendon Street and a court or street leading southerly therefrom in said Boston. Said houses are to be insured, payable in case of loss to said corporation as mortgagees, and the whole amount of each of said mortgages shall be upon interest from and after the time of making the first payment thereon."

Annexed to the contract was a schedule of four payments to be made on each lot, the first payment to be when the roof should be boarded in, and the last when the house should be finished. Writ dated December 3, 1875.

The case was tried in this court, without a jury, upon the report of an auditor, before *W. Allen*, J., who found for the plaintiff in the sum of $19,119.72. Both parties alleged exceptions, and the judge reported the case for the determination of the full court. The facts appear in the opinion.

E. Avery & E. P. Brown, for the plaintiff.

G. O. Shattuck, for the defendant.

COLBURN, J. In order to determine the questions raised in this case, it is necessary to understand certain facts, which were found by the judge who tried the case, as appears by the report.

As early as May 16, 1871, Rice and Hanson made application to the defendant to advance to them $58,000, on eleven houses which they proposed to build on a lot of land in Boston, which they had bargained for, but to which they did not acquire title until August 22, 1871. The defendant made a written agreement with Rice and Hanson, which, though dated May 16, 1871,

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could not have been written until after July 1, 1871, as it refers to facts which did not exist and transactions which did not occur until after that date, and was doubtless designed to express in writing the results which had from time to time been reached, in the negotiations between the parties, which had begun as early as May 16. The defendant agreed to advance the money, upon the terms and conditions set out at length in said written agreement, among which were the following: Rice and Hanson were to execute the eleven mortgages to the plaintiff, give the defendant an order on the plaintiff for all money to be lent by the plaintiff on said mortgages, execute certain second mortgages to the defendant, as further security to him, forthwith commence the erection of the houses and complete them, in a certain manner, within a certain time, at a certain cost for each house. All money received by the defendant from the plaintiff was, by the terms of this agreement, to be held by him, as collateral security to repay him for any sums of money advanced by him to Rice and Hanson, together with interest and certain commissions which Rice and Hanson agreed to pay him. The defendant had full discretion, in making the advances, with reference to the progress and quality of the work.

The defendant made application to the plaintiff for the loan, in June 1871, submitting to the plaintiff a plan and proposals; and, on June 19, the plaintiff voted to make the loan "on property described in the plan and proposals submitted to us, when the buildings are finished up and completed, and ready for occupancy." At some time after June 19, probably before July 1, but certainly before July 10, the terms of the agreement declared on were settled, as the report finds that this agreement was executed on July 10, 1871. It does not appear that any agent of the plaintiff made any examination of the work which had been done when this agreement was entered into, and, so far as the report finds, no such agent had been inside any of the houses, until they were nearly finished.

Though the mortgages were to be given by Rice and Hanson, it is obvious that the defendant conducted the whole negotiation, and, under the agreement with Rice and Hanson, controlled the whole business, as between himself and them, and had full knowledge of what had been done upon the land.

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1. The report finds that prior to July 1, 1871, the foundations of all the houses had been completed, and the walls were up one story; and the first question presented is, whether the defendant is liable under his agreement for defects in the foundations of the houses. We are of opinion that the foundations were parts of the houses; and that, having reference to the position of the parties, the purpose they had in view, their relative knowledge of what had been done, and how it had been done, the stipulation in the agreement in suit, that "Rice and Hanson shall complete and finish, as soon as may be, in good, workmanlike manner," the eleven houses, at a certain cost for each, applied to the entire structures, including the foundations; that the parties intended by the language used, and the defendant agreed, that the plaintiff, in consideration of its advance of money on unfinished houses, should be placed, in the end, in the same position it would have occupied if it had made the loan in accordance with the vote of June 19, "on property described in the plan and proposals submitted to us, when the buildings are finished up and completed and ready for occupancy." A person may agree to complete and finish a house before it is begun, or in any stage of the process of construction, and whether the agreement relates to the whole structure, or only to what apparently remains to be done, when the agreement is silent upon the subject, must be determined by the language used, as applied to the facts and surrounding circumstances in each particular case. We see nothing in the agreement, or in any facts or circumstances in this case, to indicate that the parties understood that all that had been done was accepted by the plaintiff, so that the stipulation in the agreement related only to the residue of the work. The facts and surrounding circumstances in this case are widely different from those in the case of *Hyannis Savings Bank* v. *Moors*, 120 Mass. 459.

2. In November 1873, the plaintiff sold one of the houses, under the power of sale contained in the mortgage of that house, for non-payment of interest; and the next question is whether, by this sale, the defendant was released from his liability on the agreement; and we are of opinion that he was not. He made no request for an assignment of any of the mortgages, and the plaintiff was only to make such assignment upon his request, and

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his deeming it necessary for his security to take such assignment. The full amount had been advanced by the plaintiff upon each mortgage, the house covered by each mortgage was only held under the mortgage for the amount of principal and interest due on that mortgage, and if the plaintiff saw fit to sell one of the houses under the mortgage thereon, and relieve the defendant from all liability on that house, he has no cause to complain.

3. The plaintiff made its last payments under the contract on May 29, 1872, and on August 3, 1872, offered to surrender the agreement if there were no liens on the property. The plaintiff did not surrender the agreement. The defendant contends that he was a mere guarantor, and that the plaintiff by these acts, and by not notifying him that it should hold him responsible for the breach of the contract, in effect said to the defendant that it was satisfied that the contract had been performed, and he was thereby induced not to avail himself of his right to take an assignment of the mortgages at a time when the property was amply sufficient to protect him from loss; and that the plaintiff has been guilty of such laches as will prevent its maintaining the action. But the defendant was in no proper sense a mere guarantor. He was the chief actor in the whole matter, for a liberal compensation. He knew of the defects in the foundations and the deficiencies in the houses; he had paid for the foundations, getting a deduction of twenty per cent from the contract price on account of deficiency in the work, and he knew that the houses had only cost about one half of the sum he had agreed with the plaintiff they should cost. The report does not find that the plaintiff accepted the houses, and finds that it had no knowledge that the foundations were defective until October 22, 1873. We see no error in law in the ruling of the judge, that the acts of the plaintiff would not prevent it from recovering for the defects in the foundations.

4. The only remaining question is as to the rule of damages. If the houses had been built in the manner and at the cost required by the agreement, the obligation of the defendant would have been fully performed; he was in no way responsible for the value of the houses, if so built, or their sufficiency as security for the mortgages.

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The measure of damages is the difference between the value of the houses as they were in fact built, and the value they would have had if built in conformity to the agreement, or so much of this difference as would have been necessary, with the value of the houses as built, to have paid the mortgage debt and interest then due; and the time for determining these values was the time when the defendant left the houses, as finished, or as soon afterwards as the plaintiff had notice of the defects and deficiencies, or might have had such notice, by the exercise of reasonable diligence.

The report finds that the plaintiff first had notice of the defects in the foundations, which is the chief defect complained of, on October 22, 1873, and there is nothing in the report to indicate that reasonable diligence on the plaintiff's part would have led to earlier notice of this defect. The report finds that the values of the houses remained the same from July 1, 1872, to the autumn of 1873; and as the plaintiff is charged with that value, the time of assessment of damages, between those limits, becomes comparatively unimportant. As the plaintiff appears to have made no special objection to the houses on account of cost, and made no request for a finding of the value the houses would have had if they had cost the sums agreed upon, the plaintiff should perhaps have been held to have waived any objection on that account, especially as the result is not thereby affected. Assuming the objection to the cost to have been waived, then the measure of damages was so much of the difference in value between the houses as they were in fact built, and the value they would have had if the foundations had been properly constructed, as added to the value of the houses as in fact built was sufficient to pay the principal of the mortgage debt and the interest due thereon, October 22, 1873. The judge did not in terms adopt this rule, as he fixed no maximum liability; but, under the facts in this case, it was not necessary that he should, as the auditor finds that the houses on the street would have been worth $7000 each, and those on the court $6000 each, on good foundations, which was more than sufficient to have paid the mortgage debt, with all interest due thereon, on October 22, 1873, the mortgages on the houses on the street being $6000, and on those on the court $5000. In holding that the plaintiff

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should be charged with the value of the houses, with their defects known, as of October 22, 1873, we assume, as the report and briefs of counsel assume, though there was no direct finding upon this point, that there had been a breach of condition, so that the houses could have been sold under the mortgages at that time. If the houses had been then sold, the plaintiff would have been chargeable with only the amounts received from the sales; but, having neglected to sell, or to make any demand upon the defendant for nearly two years after October 22, 1873, during which the houses, irrespective of defects, had largely decreased in value, the defendant cannot be charged with this decrease. *Judgment on the finding.*

JOHN W. MCKIM, Judge of Probate, *vs.* JOHN J. WILLIAMS.

Suffolk. Nov. 16, 1882. — Jan. 9, 1883. W. ALLEN & HOLMES, JJ., absent.

The failure to bring an action, within the time prescribed by the statute of limitations, for breaches of a bond given by the guardian of an insane person, in not returning an inventory within three months, and in not rendering an account within one year of his appointment, does not discharge the sureties on the bond from liability for a subsequent breach by the principal, in not paying upon demand to his successor, after removal from office, the estate remaining in his hands as guardian.

CONTRACT, on the Gen. Sts. *c.* 101, § 32, against the sole legatee under the will of P. F. Lyndon, a surety on the bond of James D. Judge, as guardian of Joseph O'Rourke, an insane person, for whose benefit the action is brought, for breach of one of the conditions of said bond. Writ dated June 11, 1881. The case was submitted to this court on agreed facts, which appear in the opinion. If the action could be maintained, judgment was to be entered for the plaintiff in the sum of $2661.59, and interest from March 8, 1880; otherwise, judgment for the defendant.

S. W. Trowbridge & J. M. Tuohay, for the plaintiff.

T. J. Gargan & W. Adams, for the defendant.

MORTON, C. J. In December 1872, James D. Judge was duly appointed guardian of one O'Rourke, an insane person, and

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gave a bond signed by P. F. Lyndon as one of the sureties. Judge failed to return an inventory within three months, and also failed to render an account within one year of his appointment, as required by the bond. In May 1880, Judge was removed from his office and trust as guardian, and John M. Donovan was appointed his successor. Judge neglected and refused to pay to Donovan, upon demand, the estate and effects remaining in his hands as guardian; and for this breach of the bond this action is brought. Lyndon died in April 1878, leaving a will, in which the defendant was named as executor and sole legatee.

It is admitted that the defendant is liable in this action, unless the estate of Lyndon was discharged from liability on the bond by the failure of the plaintiff to commence a suit or suits for the first two breaches of the bond by Judge, in not returning an inventory and filing an account. We know of no principle on which it can be held that the failure to commence suits for these breaches discharged the sureties from their liability for subsequent breaches. The bond is a continuing security, and each successive failure to comply with the conditions was a new breach, and created a new and independent cause of action. Though the first breaches may be barred by the statute of limitations, the new breach furnishes a new cause of action, which may be sued at any time within the period of limitation after it accrued. *Austin* v. *Moore*, 7 Met. 116. *Prescott* v. *Read*, 8 Cush. 365. That Judge was not called to account, and was not removed at an earlier day, cannot be regarded as laches on the part of the plaintiff, but is a not improbable incident to the nature of the contract which the sureties entered into. *Chapin* v. *Livermore*, 13 Gray, 561. It follows that the defendant is liable in this action. Judgment must be entered for the plaintiff, and execution awarded for the amount agreed upon by the parties. *Judgment for the plaintiff.*

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NATHAN J. MARSHALL, administrator, *vs.* HANNAH JAQUITH.

Suffolk. Nov. 24, 1882. — Jan. 9, 1883. DEVENS & HOLMES, JJ., absent.

A husband may make a gift of personal property to his wife, which, if not revoked by him, will, after his death, give her a valid title to the property against his heirs, if, with the intention on his part to give it to her, the property is actually delivered to and retained by her, and no rights of the creditors of the husband are impaired.

APPEAL from a decree of the Probate Court, allowing the third account of the administrator of the estate of Joseph Marshall. Hearing before *Field*, J., who found the following facts:

Joseph Marshall died intestate on July 15, 1877. Five or six months before his death, being in health and not apprehending immediate death, he gave to his wife four $1000 and two $100 United States six per cent bonds in the following manner: He called in his nephew, Joseph B. Marshall, and in his presence, and in the presence of the wife, took these bonds from his pocket and handed them to Joseph B. Marshall, and said, "I give these bonds to you to give them to your aunt;" and at the same time he said, "Look them over; I give them to your aunt;" and to his wife he said, "I give them to you; take them, and use them for your own use and support." Joseph B. Marshall took them, examined them, and then handed them to his aunt, the wife. She said, "Will this transaction stand law?" and Joseph Marshall said, "Yes, as this is positive proof."

Joseph Marshall, in handing these bonds to Joseph B. Marshall, did not intend to give the bonds to him, or to pass the title of the bonds to him, but did intend that the bonds should pass through his hands, that he might examine them and witness the transaction, and that they should then become directly the property of the wife. The wife took the bonds and put them in a tin box, of which she had the key, and which she called hers, which originally was her father's box and on his death had fallen to her, but at what time prior to this gift of the bonds did not appear. These bonds were kept by her in the box, with a few coins she called hers, separate and apart from the other property, notes and mortgages of Joseph Marshall, which were

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kept elsewhere until after his death, when the bonds were delivered by the widow, as her own property, to the administrator to keep for her, and not as a part of the estate of Joseph Marshall. This gift in amount was reasonable in reference to the remaining property of Joseph Marshall, and there are no creditors whose debts have not been paid in full. Joseph Marshall never revoked or recalled this gift. The appellant is a child of the intestate, and is entitled to a distributive share of his estate. The bonds and their proceeds have, since the death of Joseph Marshall, been kept by the administrator as the agent of the widow, separate and apart from the assets or property of the estate, and a portion of the proceeds of the bonds has been applied by the widow towards her support since the death of her husband.

The judge ruled, as matter of law, that this gift was valid, after the death of Joseph Marshall, as against the appellant, and that the administrator was not to be charged with the value of these bonds in his account, and, in this respect affirmed the decree of the Probate Court; and, at the request of the appellant, reserved the case for the determination of the full court; such decree to be entered as law and justice might require.

H. N. Sheldon, for the administrator.

W. F. Slocum, for the appellant.

COLBURN, J. A husband may make a gift of personal property to his wife, which, after his decease, will give her a valid title to the property against his heirs. To accomplish this result, there must be an actual delivery of the property to the wife, with the intention to give it to her, a retention of the custody of the property by the wife, separate and distinct from other property of the husband, and rights of creditors of the husband must not be impaired. *McCluskey* v. *Provident Institution for Savings*, 103 Mass. 300. *Fisk* v. *Cushman*, 6 Cush. 20. *Adams* v. *Brackett*, 5 Met. 280.

Actual delivery to the wife of property which passes by delivery, and retention of the custody by her, are equivalent to the deposit of money, or the taking of certificates of stock or a promissory note, in her name. The title and possession of the property remain in the husband, during his life, the possession of the wife being in legal contemplation the possession

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of the husband, and he may revoke the gift at any time, creditors may attach it as his property, and the wife can maintain no action at law in relation to it, in her own name, during the husband's life. *Spelman* v. *Aldrich*, 126 Mass. 113. *Towle* v. *Towle*, 114 Mass. 167.

The case is not affected by the Gen. Sts. *c.* 108, § 10, which did not restrict the rights of husband and wife as they existed before, but only provided that a husband should not give property to his wife, so that it should become her sole and separate property, like gifts from other persons. *Whitney* v. *Wheeler*, 116 Mass. 490. *Towle* v. *Towle*, *ubi supra*.

A husband may make a valid gift *causa mortis* to his wife, *Whitney* v. *Wheeler*, *ubi supra*, and between husband and wife the requisites and effects of gifts *inter vivos* and *causa mortis* are nearly identical. To establish gifts of this description, there should be clear, satisfactory and incontrovertible evidence, not only of the gift and delivery of the property, but of the separate custody of it by the wife. *Herr's appeal*, 5 Watts & Serg. 494. *George* v. *Spencer*, 2 Md. Ch. 353.

In the case at bar, everything necessary to constitute a gift, perfected in the wife, is found to have been established.

Decree affirmed.

GUSTAVUS D. DOWS & another *vs.* GEORGE W. SWETT.

Suffolk. Nov. 16, 1882. — Jan. 10, 1883. W. ALLEN & HOLMES, JJ., absent.

An oral guaranty of the payment of the note of a third person, given in payment of a debt of the guarantor, is within the statute of frauds, even if the principal object of the transaction is the payment of the guarantor's own debt.

C. ALLEN, J. This case, unfortunately, must be sent back for another trial, and it becomes desirable to state more fully the principles on which its determination must depend. The declaration alleges, in substance, that the defendant was indebted to the plaintiffs in the sum of $200 for the balance due on a due-bill given to them for goods sold and delivered by them to him, and that he asked them to take in exchange for

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the sum due on said due-bill a promissory note for the same sum which he had caused to be made, and which was signed by one Robinson, and made payable to the order of the plaintiffs; and, to induce the plaintiffs to make said exchange, the defendant agreed that, if said note should not be paid by Robinson at its maturity, he, the defendant, would pay it himself; that upon this verbal guaranty the plaintiffs received the note, and gave therefor the due-bill; that the note was not paid by Robinson, and that the defendant refuses to fulfil his said agreement. There was evidence at the trial tending to show that in 1874 the plaintiffs brought an action against the defendant upon their account for goods sold and delivered, and that at the trial of said action in 1874 it appeared that the bill for the goods was settled by check and by the said due-bill, and that the due-bill also was paid by cash, merchandise and said Robinson's note; whereupon a verdict was taken for the defendant, upon which judgment was rendered.

The difficulty in the case seems largely to depend upon the unusual state of facts; there having been an action brought by the plaintiffs against the defendant upon his original indebtedness to them, in which action a judgment was rendered for the defendant.

Where a note of a third party is taken by a creditor from his debtor, for or on account of a preëxisting debt, or on a consideration then first accruing, it may be received either in absolute payment, conditional payment, or as collateral security. And in every case it may be shown by evidence what was the actual transaction, and on what terms the note was received. *Butts* v. *Dean*, 2 Met. 76. *Parham Sewing Machine Co.* v. *Brock*, 113 Mass. 194. Where such note is taken in absolute payment of a preëxisting debt, or of a liability for money lent, service rendered, or other consideration accruing at the time of taking it, the effect, of course, is to extinguish the liability of the person who transfers the note, and to substitute therefor the liability of the parties to the note, as the sole subsisting obligation. But where the note is taken as collateral security, or in conditional payment, the right of action against him who makes the transfer is not defeated altogether, but is, at most, only suspended during the time the note has to run, and revives

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again upon the nonpayment of the note at its maturity. The original indebtedness in such case is not discharged, unless the note is paid. *The Kimball*, 3 Wall. 37. Byles on Bills (6th Am. ed.) 236, 380, 385. 2 Am. Lead. Cas. (4th ed.) 250, 251, and cases cited. *Belshaw* v. *Bush*, 11 C. B. 191, 206. *Valpy* v. *Oakeley*, 16 Q. B. 941. *Miles* v. *Gorton*, 2 Cr. & M. 504, 512.

In the latter class of cases, the transaction is as if the debtor said: "I owe you a debt. Take this note, and collect it if you can. If you get the money on it, that will pay you. If you do not, I will myself pay you what I owe." In all such cases, the defendant's promise is in effect to pay his own debt, and it is not necessary that such promise should be in writing, though incidentally the debt of a third person is guaranteed. And many of the decisions of courts, which at first sight may appear to hold that an oral guaranty of the note of another, which is transferred on account of a debt due from the guarantor, is not within the statute of frauds, will on a careful examination be found not to rest on the principle above stated, and not to be necessarily inconsistent with our own conclusion in the present case. For example, in *Milks* v. *Rich*, 80 N. Y. 269, 271, Earl, J., after stating that "the reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yielding it my assent, but for the authorities which I think ought now to control," goes on to say: "The defendant's promise may be regarded, in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff for the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt, in case a third person did not pay it." In *Bruce* v. *Burr*, 67 N. Y. 237, the decision rests on the same distinction; and both cases refer, for authority, to *Cardell* v. *McNiel*, 21 N. Y. 336, where Comstock, C. J., in delivering the opinion of the court, said: "In mere form it was certainly a collateral undertaking. . . . . But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him,

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and thereby discharge him." In all these cases, it will be observed that the court carefully put the decision on the express ground that the original debtor is not discharged, and his debt is not extinguished, until the note is actually paid. So in Pennsylvania, in *Taylor* v. *Preston*, 79 Penn. St. 436, 441, Mr. Justice Woodward, a high authority, says, the statute does not require the promise to be in writing "where it is in effect to pay the promisor's own debt, though that of a third person be incidentally guaranteed; it applies to the mere promise to become responsible, but not to actual obligations" — i. e. of the promisor. "Buying the land, the promise to pay for it, whatever the form, was a promise to pay their own debt." It "was not only a stipulation to pay a debt which Preston owed, but a stipulation to pay the price of property they had bought." To the same effect are *Townsend* v. *Long*, 77 Penn. St. 143, and *Malone* v. *Keener*, 44 Penn. St. 107.

The above suggestions will not reconcile all the cases; but in our opinion they are sufficient to show the just grounds on which the application of the clause of the statute of frauds now under consideration depends. When the present case was first before this court, 120 Mass. 322, the decision was put expressly on the ground that the defendant's previous liability had been settled and discharged, so that the only existing direct liability was that of Robinson upon his note; and under this state of things the defendant's oral promise to pay the note, if Robinson did not, could not be treated as a promise to pay a subsisting debt of the defendant, but only as a collateral promise to pay Robinson's debt, and as such was within the statute of frauds. Upon further consideration, we adhere to that decision as a correct exposition of the law. When the case came a second time before this court, 127 Mass. 364, the point determined was that the plaintiffs were not precluded by what had happened before from relying on the second and third counts; and for this reason a new trial was properly granted. An additional statement in the opinion may have led to the inference that, in the view of the court, if the leading and chief object of the defendant's promise was in effect to pay his own debt, it should be considered in substance that the defendant guaranteed his own debt, and that therefore his promise to pay Robinson's note, if Robinson should

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not, was not within the statute of frauds; and the learned judge of the Superior Court, upon the new trial, so ruled. But we think this ruling cannot be supported, as applicable to the case, as it comes before us. If Robinson's note was not taken in absolute payment, and if the due-bill was still an existing liability, then the defendant's promise might perhaps be found, as matter of fact, to have been intended and accepted as a promise to pay the due-bill. But if the note was taken in absolute payment, then the liability of the defendant was of course extinguished, and it follows that the only remaining direct liability was that of Robinson on his note, and the promise of the defendant could be treated only as collateral. The declaration is on a promise to guarantee Robinson's note, and it is not a case for saying that the declaration is inartificial, and that in substance and effect it sets out a promise by the defendant to pay his own debt; because, in the first place, the declaration appears to have been very carefully drawn, and, in the second place, the evidence tended to show that the plaintiffs in their former action sought to recover on their own debt, and failed.

It does not distinctly appear whether there was then a count upon the due-bill, as representing a cause of action distinct from that for goods sold and delivered. But in the present action the third count was upon the due-bill, and it has been stricken out, upon the order of the judge that the plaintiffs should elect upon which count they would proceed to trial. The due-bill is out of the case. Only the first count remains. The question, therefore, is now distinctly presented, whether the defendant can be held liable on an oral promise to guarantee the note of a third person, transferred by him to his creditor, when that promise cannot by any construction be enforced as in reality a recognition of, or a promise to pay, his own preëxisting debt. To hold him liable, under such circumstances, would be to hold him to a greater liability than if he had put his name upon the back of the note, and would be inconsistent with the Gen. Sts. *c.* 105, § 1. *Exceptions sustained.*

J. B. Richardson, for the defendant.

D. B. Gove, for the plaintiffs.

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EDWARD G. BYINGTON & another *vs.* JOHN B. SIMPSON & another.

Suffolk. January 10. — 11, 1883. FIELD & W. ALLEN, JJ., absent.

A. entered into a contract with B., as agent for C., to build two houses. After the first house was partly built, and a certain sum was due and unpaid for work thereon under the contract, A. refused to go on with the second house unless he received some security; and B. and C. thereupon executed and delivered to A. an instrument, in which they promised to pay him the sum so due within a time named, provided that A. should perform his part of the contract to build the house, and that all money paid by B. to A. on account of building the house, above the contract price, should be indorsed on the note. Afterwards A. completed both houses according to the contract. *Held*, in an action against B. and C. on the instrument signed by them, that there was a good consideration for the instrument.

CONTRACT, against John B. Simpson and Lucy Simpson, upon the following instrument in writing, signed by the defendants: "$500. Boston, April 2, 1878. Three months after date, we jointly and severally promise to pay to Edward Byington and Edward Lanpher, copartners under the firm name of Byington & Lanpher, five hundred dollars; provided that said Byington and Lanpher shall faithfully keep and perform their contract to build a house on lot No. 2 on Ray Street, in said Boston, in the county of Suffolk and Commonwealth of Massachusetts, according to 'specifications of materials to be furnished and labor to be performed in building a house on Ray Street for J. B. Simpson, agent.' Said specifications are dated January 18, 1878. Said contract is signed by E. G. Byington, Edward Lanpher and J. B. Simpson, agent, and is dated January 22, 1878. All money paid by said Simpson to said Byington and Lanpher on account of building said house, above six hundred dollars, shall be indorsed on this note. Said contract price being eleven hundred dollars. For value received." The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, upon agreed facts, in substance as follows:

The instrument declared on was signed by the defendants and delivered to the plaintiffs on the day of its date, under the following circumstances: The plaintiffs were engaged in building two houses upon two lots of land on Ray Street in Boston, the record title to which stood in the name of the defendant, Lucy Simpson,

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under a contract signed by the plaintiffs and by "J. B. Simpson, agent." After the first house was partly built, and about $500 was due and unpaid for work thereon under the contract, the plaintiffs refused to go on with the second house unless there was some assurance of their pay, and asked J. B. Simpson to give them something that would satisfy them that they would be settled with when they got through. The next day J. B. Simpson brought them the instrument declared on, and the plaintiffs took the same, giving the following receipt therefor, signed by them: "$500. Boston, April 2, 1878. Received of J. B. Simpson and Lucy Simpson a condition note of $500, as collateral security on part payment on contract of building house on Ray Street, by contract, it being eleven hundred dollars. All money paid over $600 to be indorsed on said note."

The plaintiffs afterwards went on and completed both houses substantially in accordance with the contract; and, at the expiration of three months from the date thereof, payment of the instrument declared on was duly demanded, but the same has never been paid. Other than as may appear from the foregoing facts, there was no consideration for the instrument declared on.

If, upon these facts, the plaintiffs were entitled to recover, judgment was to be entered for them for $393.57 and interest; otherwise, judgment for the defendants.

J. H. Benton, Jr., for the defendants.

S. L. Powers, (*G. W. Sanderson* with him,) for the plaintiffs.

By the Court. The plaintiffs entered into a contract with "J. B. Simpson, agent," to build two houses. After the first house was partly built, and about $500 was due and unpaid for work thereon under the contract, the plaintiffs refused to go on with the second house unless they received some security, and the defendants thereupon executed and delivered the instrument in suit. There was a breach by Simpson of the building contract; the plaintiffs were not obliged to go on and perform it. Though not directly stated in the agreed facts, the necessary implication from what is stated is, that the plaintiffs agreed to, and did, waive the breach of the contract, and agreed to, and did, go on with its performance. This was a good consideration for the contract declared on in this suit.

Judgment for the plaintiffs affirmed.

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MARTIN D. HOLMES *vs.* OLIVER H. FLANDERS & others.

Suffolk. January 10. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

In an action against three defendants, for obtaining by fraud a conveyance of real and personal property of the plaintiff, one of the defendants testified that he acted in good faith, and that his only connection with the matter was in making an advance to one of the co-defendants, and in selling the personal property as an auctioneer. *Held*, that evidence was inadmissible, in his favor, that the co-defendant had previously applied to another auctioneer to make an advance and to sell the same property, who was not employed, because he charged more than the defendant.

TORT, against Oliver H. Flanders, Hebron Libbey and Andrew B. Potter, for fraud in obtaining a conveyance of the plaintiff's farm, and certain personal property thereon, in Hopkinton, in exchange for certain real estate in Chelsea. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

It appeared in evidence, that the plaintiff instructed one Burtis Judd, a real-estate agent residing in Framingham, to sell or exchange his said property, and about August 21, 1880, negotiations for an exchange began between Judd and the defendant Flanders; that these negotiations continued until October 15, 1880, when an agreement was made, by which the plaintiff agreed to exchange his said property for certain real estate in Chelsea; that on October 25, 1880, the plaintiff conveyed to the defendant Libbey his said property by deed and bill of sale, receiving from Libbey therefor a deed of certain real estate in Chelsea, which deed the plaintiff claimed to be fraudulent, as not covering the premises bargained for.

The defendant Potter testified that he never had any knowledge of, or connection with, the negotiations aforesaid, or of said exchange, or of the terms thereof, and was in no way interested therein, or privy thereto; that his first knowledge of the plaintiff, or of his property, was about the middle of October 1880, when Flanders informed him that he had traded for, or was about to trade for, some farm property in Hopkinton, and desired him to sell the personal property for him by auction, and to make an advance to him upon a pledge of the personal property; that he went to Hopkinton and examined the property,

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and offered to Flanders an advance of $500, and to sell the same as auctioneer for $75; that Flanders did not then accept the offer, but on October 25, 1880, informed him that he should want the money; that on the next day Flanders exhibited to him a bill of sale of said personal property from the plaintiff to Libbey, and delivered to him a bill of sale of the same property from Libbey, upon which he advanced the sum of $500, and the next week advertised and sold said property at the request of Flanders, and, reserving from the proceeds his advances, paid the balance thereof to Flanders; that, except as licensed auctioneer, selling said personal property and making advances thereon, he had no connection with or interest in the trade between the plaintiff and Flanders or Libbey, and had never had any conversation or communication with the plaintiff, or any one else, as to the consideration for the plaintiff's conveyance, nor any knowledge thereof.

There was also evidence tending to show that the defendant Potter participated with the other two defendants in the alleged fraud. The defendants called as a witness Samuel R. Knights, a licensed auctioneer, and offered to show by him that, at about the time Flanders first applied to Potter, he also applied to Knights to sell the same property for him as auctioneer, and to make him an advance upon it; and that Knights went to Hopkinton, examined the property, and offered to Flanders an advance thereon of $500, and to sell the same as auctioneer for $150; but, upon objection by the plaintiff, the judge refused to admit the evidence.

The jury returned a verdict against all the defendants; and the defendant Potter alleged exceptions to the refusal to admit said evidence.

E. W. Cate, for Potter.

R. M. Morse, Jr. & W. H. Towne, for the plaintiff.

By the Court. The acts and declarations of the defendant Flanders in the transaction with Knights, offered to be shown, were not admissible in his own favor, or in favor of his co-defendant Potter. *Exceptions overruled.*

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MARY A. McDOUGALL *vs.* CITY OF BOSTON.

Suffolk. January 10. — 18, 1883. FIELD & W. ALLEN, JJ., absent.

A notice to a city, under the St. of 1877, *c.* 234, that a person has been injured, at a time and place named, by "an iron grating, in said sidewalk, at said place, which was defective and out of repair, and projected above the level of said sidewalk two inches or more, over the projecting part of which the plaintiff tripped and fell," is not sustained by proof that the plaintiff slipped upon a piece of smooth ice, and did not touch the grating until he lost his balance and fell upon it.

TORT for personal injuries occasioned to the plaintiff on January 29, 1881, by a defect in Porter Street in the defendant city. At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

W. H. Towne, for the plaintiff.

T. M. Babson, for the defendant.

COLBURN, J. The notice given by the plaintiff in this case, which was a condition precedent to the right to maintain her action, *Gay* v. *Cambridge*, 128 Mass. 387, was given within thirty days of her injury, and apparently stated with sufficient accuracy the time, place, and cause of her injury, as required by the St. of 1877, *c.* 234. She states in her notice that the cause of her injury "was an iron grating, in said sidewalk, at said place, which was defective and out of repair, and projected above the level of said sidewalk two inches or more, over the projecting part of which the plaintiff tripped and fell." The evidence proved the existence of the defective grating, at the place described in her notice; and the defendant admitted, for the purposes of the trial, that it was a defect in the street. There was evidence, on the part of the defendant, tending to show that the plaintiff slipped upon a piece of smooth ice, and did not touch the grating until she lost her balance and fell upon it. The cause of her injury, which the statute required the plaintiff to state, was the defect or want of repair which caused her fall, and she undertook to state it; but if the evidence introduced by the defendant was believed, she had stated an entirely wrong cause. The city was not liable because the

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grating was not a desirable thing to fall upon, if it in no way caused the fall. A statement in general terms, that the cause is a defect in the street, would be insufficient; *Miles* v. *Lynn*, 130 Mass. 398; but a notice stating a wrong cause would obviously be, not only of less use than a general notice, but positively misleading and injurious to the defendant. The ruling of the Superior Court, "that the plaintiff was bound by the statement in the notice as to the cause of the accident, and was limited to the defect stated therein, and that, if her foot did not come in contact with the grating at all, but the cause of her fall was the ice, she could not recover because in falling she struck the grating," was right. *Exceptions overruled.*

EVA A. HOGLE *vs.* CHARLES H. CONNELL & others.

Suffolk. January 11. — 18, 1883. FIELD & W. ALLEN, JJ., absent.

Under the Gen. Sts. *c.* 85, §§ 1, 2, the amount of money lost as the net result of continuous gaming at one sitting, of mixed losses and gains or continuous losses, may be declared for in one count as a single loss.

TORT in eight counts, under the Gen. Sts. *c.* 85, §§ 1, 2, to recover treble the amount of money alleged to have been lost by Stephen J. Palmer, and paid to the winners thereof, at various times named, by playing at cards, with the knowledge or consent of the defendants, in a building of which the defendants were tenants or occupants, and to recover which Palmer had failed to prosecute an action within three months of the loss. Answer, a general denial.

Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

It appeared from the evidence that Palmer purchased at this place what were called chips, made of ivory, and representing in each chip the sum of twenty-five cents, fifty cents and one dollar, respectively, for which he paid an equal amount in money. With these chips Palmer played at a game with cards called faro, in the following manner: He sat at a table on which were painted the figures of thirteen cards in a suit.

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Opposite to him sat a dealer, usually one of the defendants, who represented what was called a bank. The bets were made by Palmer putting one or more of the ivory chips he had purchased, representing his bet, upon one of the painted representations of cards on the table; and, as the dealer drew from a pack of cards in a box, the bet was determined by the chance of alternate cards turning up to correspond with the card on the table on which Palmer had placed his bet.

Palmer testified, that he lost at one sitting, at or about the respective dates named in each of the counts in the declaration, the sums of money respectively alleged therein; that it was impossible to say what sum he lost at the first, or at any other of the numerous bets he made during such sitting; that he did not purchase at one time chips to the amount named in either of said counts; that his first purchase might be five, ten, fifteen or twenty dollars; that, when he had played and lost the chips so purchased, he made other and successive purchases; that he was unable to state the amount of any one of such purchases, but that he purchased and lost the amount alleged in each of the several counts during his continuous playing at one sitting, at or about each of the dates named; and that he made several purchases at each sitting.

It also appeared in evidence that the winners at this game were entitled to have the chips in which the bets were paid redeemed in money at the moment each bet was decided; but that the practice was to redeem and settle at the close of the sitting. No other evidence was offered to show what amount Palmer lost at or upon any one bet, or the specific amount of any one of his purchases of chips.

The defendants contended that each act of betting, if unfavorable to the player, was a separate loss, and constituted by itself, if supported by other necessary facts, a cause of action for which the plaintiff was entitled to recover three times the sum so lost, and should be separately set forth and proved; and that the jury should be instructed that, if there was no evidence on which they could find what sum Palmer lost by any one act of betting, then the plaintiff must fail in her action; or if the jury could assume upon this evidence proof of the minimum sum of such bets, namely, one chip of the value of twenty-five cents,

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then the plaintiff's right to recover on each count was limited to three times such minimum amount; or that, if such was not the rule of law applicable to this state of the evidence, then the plaintiff's right to recover must be limited to three times the amount of some one purchase of chips on the respective dates alleged in the several counts of the declaration, if such amount could be ascertained from the evidence given in the case.

The judge declined to instruct the jury as requested, but instructed them that, if they found that the defendants, at the time alleged and proved, were tenants or occupants of the place where this game was played, and if, with the knowledge or consent of the defendants, Palmer did, by continuous playing at one sitting on each of said dates, lose the sums of money respectively alleged to have been lost on those dates, though such loss was the aggregate result of a large number of small bets, and was made through several purchases of chips, but in continuous playing during the same sitting, and if, as was conceded, Palmer had not, within three months after said losses, without covin or collusion, prosecuted with effect an action to recover the same, then the plaintiff might recover three times the amount so lost by said Palmer at each of said sittings.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

A. Russ, for the defendants.

D. F. Crane, for the plaintiff.

COLBURN, J. The only question presented for our determination at the argument in this case, if not the only question raised by the bill of exceptions, is whether, in an action brought under the Gen. Sts. *c.* 85, §§ 1, 2, to recover money lost by playing at cards, in the manner described in the bill of exceptions, the plaintiff must declare for each loss, made by each losing bet, at continuous playing at one sitting, or whether he may treat continuous playing at one sitting as one transaction, and declare in one count for the money lost, as the net result of continuous playing at one sitting.

We are of opinion that he may recover on a single count the amount of money he brought to the game, and, as the net result of continuous playing at one sitting, of mixed losses and gains, or continuous losses left in the hands of the winner, as a single

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loss; or when the action is brought, as in this case, by a third person, the plaintiff may declare for treble the amount of such loss, in a single count. See Gen. Sts. *c.* 85, § 3.

This construction is apparently more favorable to the defendants than the one they contend for. For if the plaintiff should treat the amount lost by each losing bet or play as a separate loss, he might recover, as a loss, money he had just won in the same continuous playing, and might leave the game with more money than he took to it, and still recover various sums for losses. *Exceptions overruled.*

J. B. SIAS *vs.* ALEXANDER M. MUNROE.

Suffolk. January 16. — 19, 1883. FIELD & W. ALLEN, JJ., absent.

At the trial of an action for the price of milk, alleged to have been supplied to the defendant daily between two dates named, the plaintiff's evidence tended to show a daily delivery of milk to the defendant of six cans a day. The defendant testified that his daily rate of supply was six cans; but that during part of the period covered by the declaration he had been supplied by another dealer. He then offered the evidence of this dealer that he had supplied the defendant at the rate of six cans a day during part of the time covered by the declaration. *Held*, that the evidence offered was admissible.

CONTRACT to recover the price of milk, alleged to have been supplied to the defendant daily between February 20 and April 23, 1881. Answer, a general denial, and payment.

At a trial in the Superior Court, before *Colburn*, J., without a jury, the plaintiff introduced evidence tending to show a daily delivery of milk to the defendant, at the rate of about six cans, or nearly fifty quarts, a day; that for some months prior to the bill sued for, he had made the same rate of delivery; and that during both those periods he did not know that the defendant had been supplied by any other milkman.

The defendant testified that his daily rate of supply was, as the plaintiff had testified, about six cans; but that during part of the period covered by the declaration, namely, from April 1, 1881, to April 23, and thereafter, he had been supplied by another dealer. No objection was made to this testimony. He

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then offered the evidence of one Baker, a milkman, to the effect that he had supplied the defendant at the rate of six cans a day during the time from April 1, 1881, to April 23, and thereafter; and that during this period he did not know of the defendant being supplied by any other milkman. But the judge, upon the objection of the plaintiff, excluded the testimony, and found for the plaintiff; and the defendant alleged exceptions.

J. Willard, for the defendant.

V. J. Loring, for the plaintiff.

COLBURN, J. The testimony of Baker, in itself, was entirely immaterial; it had no tendency to disprove the plaintiff's case; but, in one view which might have been taken of the testimony of the defendant, we are of opinion that the testimony of Baker was admissible. The defendant testified that his whole supply was but six cans of milk a day, and this might have been believed, and at the same time it might have been doubted whether he was correct in his statement of the time he ceased to take milk of the plaintiff; but if he had but six cans of milk a day, in all, he could not have had that quantity of each of two persons; and, in this state of the evidence, the testimony of Baker would have been material, as tending indirectly to fix the time that the plaintiff ceased to deliver milk.

The testimony of Baker would have had no tendency to show whether the defendant had in all more than six cans of milk a day. Its admissibility depended entirely upon whether the defendant was believed in his statement as to his entire daily supply; and as it could not be known, before the trial was closed, what view might be taken of the defendant's testimony upon this point, the proper course was to admit the testimony of Baker, and to regard it or reject it as the testimony of the defendant as to his entire supply might be believed or doubted.

Exceptions sustained.

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GEORGE STUDLEY *vs.* JOSEPH B. WILLIS, administrator.

Suffolk. January 18. — 19, 1883. FIELD & W. ALLEN, JJ., absent.

An action against an administrator, for the expenses of the funeral of his intestate, brought within a year of the publication of notice of his appointment, is within the exception in the Gen. Sts. *c.* 97, § 16, of "a demand that would not be affected by the insolvency of the estate," and may be maintained.

CONTRACT, upon an account annexed, for the expenses of the funeral of the defendant's intestate. Writ dated July 19, 1881. Answer: 1. A general denial. 2. That the action was prematurely brought. Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions, in substance as follows:

The evidence tended to show that the items in the plaintiff's account were correct, and that they actually accrued in the burial of the intestate; that the defendant was duly appointed administrator of the estate of the intestate on March 1, 1880, and gave bond, but that he failed to give due notice of his appointment as ordered by the court; that, having through accident or mistake failed to give such notice, he was ordered, on January 3, 1881, by the Probate Court, to publish notice of his appointment in a Boston newspaper within three months; and that on June 4, 1881, the affidavit of notice, duly given in accordance with the last-named order, was filed in the Probate Court.

On the above facts, the defendant requested the judge to rule that the action could not be maintained; contending that the action was prematurely brought, because it could not be brought until after the expiration of a year from the time of passing the order of January 3, 1881. The judge declined to rule as requested by the defendant, and ruled that the plaintiff was not a creditor of the deceased in the sense of the statute; that the items of the account being for the funeral expenses of the deceased, the plaintiff's was a preferred claim, and would not be affected by the insolvency of the estate, and was not included in the class of claims where an executor or administrator shall not be held to answer to a suit commenced within one year after his giving bond, or after giving notice of his appointment pursuant to the order of the Probate Court, where the first notice

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through accident or mistake had not been given; and that the action could be maintained.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. T. Wilson, for the defendant.

W. C. Williamson, for the plaintiff.

By the Court. The provisions of the Gen. Sts. *c.* 97, § 16, that "no executor or administrator shall be held to answer to the suit of a creditor of the deceased, if commenced within one year after his giving bond for the discharge of his trust, unless it is for the recovery of a demand that would not be affected by the insolvency of the estate, or unless it is brought after the estate has been represented insolvent, for the purpose of ascertaining a contested claim," are not a bar to this suit, as contended by the defendant. Without considering the other answers to his claim, it is clear that the plaintiff's debt, being for the expenses of the funeral of the deceased, is within the exception of "a demand that would not be affected by the insolvency of the estate," and therefore the prohibition against bringing a suit within a year does not apply to it. *Troy National Bank* v. *Stanton*, 116 Mass. 435.

Exceptions overruled.

Henry C. Thacher *vs.* Joseph B. Moors.

Suffolk. March 9, 1880; Nov. 9, 1881; Jan. 19.—20, 1883. W. Allen, J., absent. Holmes, J., did not sit.

J., who did business in wool as a broker, as a commission merchant and as a warehouseman, applied to the plaintiff to take a consignment of wool from F., and to make advances thereon. The plaintiff agreed to take the wool, and J. subsequently delivered to him a railroad receipt, in which the wool was stated to have been received of F. and to be consigned to the plaintiff, and also an invoice, signed by F., which stated that the wool was consigned to the plaintiff for sale on account of F. On the arrival of the wool, the plaintiff gave the carrier an order to deliver it to J., and received from J. a receipt stating that he received the wool for the plaintiff's account, F. consignment; and the plaintiff paid drafts on the wool to the amount he had agreed to advance, some of the drafts being payable to the order of J. The plaintiff gave J. no authority

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to sell the wool as a factor or consignee, but entrusted it to him as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for it and to negotiate sales, to be reported to and settled by the plaintiff. While the wool was thus in J.'s possession, J. stated to the defendant, who knew that J. was a warehouseman, broker and merchant, that he owned the wool, and pledged it to him for a valuable consideration. The defendant acted in good faith; and, before lending money upon the wool, J. had the wool put in the warehouse of a third person, who gave a warehouse receipt for it. *Held*, in an action of tort for the conversion of the wool, that J. was not a factor or other agent entrusted with the possession of merchandise for sale, within the Gen. Sts. c. 54, § 2, nor a person entrusted with merchandise, and having authority to sell or consign the same, within § 3, nor a consignee or factor having possession of merchandise with authority to sell the same, within § 4; and that the plaintiff was entitled to maintain the action. *Held, also*, that the fact that J. and F. were jointly interested in the wool, J. having the right to dispose of it, and that the plaintiff, in ignorance of this fact, placed the wool in J.'s possession, did not affect his right to maintain the action.

A warehouseman, with whom goods were stored on A.'s account, pledged them to B., who removed them to another warehouse, and subsequently sold them, as pledgee. *Held*, that B. converted the goods when he removed them under a claim of right of property in them.

TORT for the conversion of 184 bags of wool. Writ dated January 12, 1878. Trial in this court, without a jury, at September term 1879, before *Ames*, J., who reported the case for the consideration of the full court, in substance as follows:

At the time of the transactions hereinafter stated, the plaintiff was a merchant, doing business in Boston under the name of H. C. Thacher and Company, and was engaged in buying, selling and receiving consignments of wool for sale on commission, and making advances upon said consignments; and the defendant was a banker, doing business in Boston under the name of J. B. Moors and Company.

One Isaac H. Jones, Jr., up to about November 15, 1877, when he absconded, carried on business in Boston, having his office in Federal Street. Upon the sign on his office door were the words "Wool Broker;" at the entrance of the building in which he had his office was painted the word "Wool;" upon some of his business cards he was styled "Wool Broker," upon others, "Wool Broker and Commission Merchant," and upon his bill-heads, "Wool Commission Merchant." It appeared that he did business in wool, partly as a broker, to a considerable extent on his own account, and sometimes as a commission merchant. He had two large lofts suitable for the storage and exhibition of

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wool, in which, in addition to his other business, he was accustomed to store wool as a warehouseman for other persons, and also wool belonging or consigned to himself. Jones had a price on, and offered for sale as a broker, all wools in his stores, but there was no evidence that the plaintiff knew this. Jones had had large transactions with the plaintiff, both as a broker and on his own account.

The defendant had known Jones for about four years and a half; had visited his office in Federal Street; had on one occasion stored wool with him as a warehouseman, and upon all the evidence must be assumed to have known his general course of business, and that he acted in the different capacities of broker and merchant and warehouseman.

Before July 1877, Jones applied to the plaintiff to take consignments of wool to be made to him by George B. Fessenden, of Wells River, Vermont. The plaintiff agreed to accept such consignments, and to advance about three fourths of their value. No agreement was made by the plaintiff with Jones at the time as to warehousing or selling said wool, or as to Jones's acting as a broker in the sale of the same.

On July 9, 1877, the first consignment was made. A railroad receipt and an invoice were enclosed in a letter to Jones, and were brought and delivered by him to the plaintiff, in whose possession they have since remained. The receipt was signed by the agent of a railroad company in New Hampshire, and stated that a certain number of sacks of wool were "received of G. B. Fessenden" and were "consigned to H. C. Thacher & Co., Boston." The invoice was headed, "Invoice of forty-five bags wool consigned to H. C. Thacher & Co. for sale for my account," and was signed "Geo. B. Fessenden." Upon the arrival of the wool in Boston, the plaintiff gave orders to the carrier to deliver it to a truckman who acted frequently for Jones, to be stored in Jones's lofts, and received from Jones the following receipt: "Boston, July 12, 1877. Received in store 102 Federal Street, for ac. H. C. Thacher & Co. 45 bags fleece wool, Fessenden consgt. ac. I. H. Jones, Jr." All the subsequent consignments were made in the same way, and similar receipts for all the consignments were given by Jones to the plaintiff. The plaintiff paid drafts upon him for three

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fourths of the value of the parcels of wool as consigned, and also paid freight to the carrier. The wool in controversy is part of said consignments. Some of the drafts on the plaintiff were payable to the order of Jones.

The wool was bought by Fessenden upon joint account with Jones, under an arrangement between them, by which Fessenden was to buy the wool of the farmers in Vermont, and Jones was to find the money (either furnishing it himself or procuring some one else to advance upon the wool) and have control of the sale of it in Boston, and the profits were to be divided between them. The plaintiff had no knowledge of this arrangement until after Jones absconded; and had no reason to suppose or suspect that Jones had any interest in the wool, or was a partner with Fessenden in the transaction. The plaintiff did not intentionally give up the control of the wool, or intend to part with his rights in delivering the same to Jones, as before stated. Jones advanced money in excess of that advanced by the plaintiff.

The wool after being received in Jones's lofts was sorted, by an order of the plaintiff given to Jones, by cutting open each bag and separating the different kinds of fleeces, one from the others. The different kinds were then put into new and separate bags. This sorting is customary, and is necessary to put the wool into a condition to be exhibited to buyers. While the wool was lying open, it was seen by the plaintiff in Jones's lofts.

Jones had no authority from the plaintiff to sell said wool as a factor or consignee, but said wool was entrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for and to negotiate sales of the same, to be reported to and settled by the plaintiff, in whose name the bills of sale were made, and who collected the price. Jones, as such broker, showed the wool to his customers, for the purpose of getting offers to purchase it; and, in two cases, reported to the plaintiff offers for two several lots, which were accepted by the plaintiff. Jones then made a broker's memorandum or bought-and-sold note, which he rendered to the plaintiff. The plaintiff then ordered the wool weighed, and sent a bill of parcels, with a certificate of weights, to the buyer, from whom he received the price, or a negotiable

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security in payment thereof, without previous direct communication between himself and the buyer. Jones received a broker's commission on the sales, and also warehouse charges. Jones did not (before the transactions with the defendant) sell any of the wool in his own name, or receive the proceeds himself, as a consignee or factor usually does, and had no authority from the plaintiff to dispose of the wool as if he were a consignee or factor. Jones entered this wool in the books in which he kept account of wool stored by him as a warehouseman, including all wools consigned to him; and also entered it in a separate book under head of "Fessenden Joint Account." These were the only sales of this wool in which Jones took any part, and in both of these cases Jones consulted the plaintiff as to the price.

Jones, while said wool, with other wool belonging to the plaintiff and for which the plaintiff held his receipts, was in his lofts, applied to the defendant at various times for loans of money upon pledges of different parcels of wool, of which he produced a memorandum and of which he said he was the owner, which statements were afterwards incorporated into contracts of pledge made with the defendant. The defendant examined samples of the wool, and agreed to make Jones loans on it, upon his having the wool put in store in the lofts of George B. Drake & Co., wool commission merchants, whose store was next to that of Jones, and bringing him a warehouse receipt therefor in each instance. The warehouse receipts were signed by George B. Drake & Co. upon printed blanks furnished by the defendant. At different times, from July 27 to November 10, 1877, Jones pledged to the defendant the different parcels making up the wool in controversy. The defendant acted in good faith, but did not ask Jones to exhibit any bill of sale, or bill of lading, or invoice, or other document of title; nor did he examine Jones's books, or see any document of title, except the warehouse receipts of George B. Drake & Co. The defendant simply asked Jones if he owned the wool, and Jones replied that he did; and the defendant relied upon this assurance and upon Jones's possession.

Neither the plaintiff nor the defendant had seen or asked to see any of Jones's books until after he absconded. As soon

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as the defendant learned that Jones had absconded, he made demand under his contracts of pledge, sought a purchaser, negotiated a sale of all the wool held by him in pledge from Jones, including the wool in controversy, and on November 22, 1877, sold the same.

Before suit, and upon the day of the date of the writ, the plaintiff demanded of the defendant the wool in controversy, and the defendant refused to deliver the same.

Upon the foregoing facts, the judge ruled, as matter of law, as follows: 1. The plaintiff had a right to consider Fessenden the owner of the wool, and had, under the Gen. Sts. *c.* 54, § 1, a lien upon it for his advances. 2. The receipts which the plaintiff took from Jones, whether they are in the usual form of warehouse receipts or not, implied that Jones held the wool for the plaintiff, and that the latter had not lost his lien by delivering the wool to Jones, under the circumstances stated. 3. Under the Gen. Sts. *c.* 54, §§ 3, 4, Jones was neither a "person entrusted with" the disposal of the wool, "and having authority to sell or consign the same," nor "a consignee or factor having possession of" the wool "with authority to sell the same," "or having possession of a bill of lading, permit, certificate or order for the delivery of" the wool "with like authority." 4. Under the Gen. Sts. *c.* 54, §§ 3, 5, Jones was not in fact invested by the plaintiff with the *jus disponendi* of the wool. He had no authority from the plaintiff to sell or consign the same; it was not in his possession as consignee or factor having authority to sell; and he had possession of no bill of lading, permit, certificate or order for the delivery of the wool with like authority. 5. As the defendant knew that Jones was a wool-broker and warehouseman, as well as a dealer in wool on his own account and as a commission merchant, and as no bill of lading, document or writing of any kind in relation to Jones's title in the wool had been called for or exhibited, the mere possession of the property, and the oral assertion of Jones that it was his, would not, as matter of law, furnish or amount to "probable cause," within the meaning of the statute; and it was the defendant's duty, in such a state of facts, to have made further inquiry, and to have required further evidence of Jones's right to dispose of the property. 6. The defendant was guilty of a

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conversion of the wool in controversy when the different parcels thereof were received by him in pledge from Jones; or, if not then, upon November 22, 1877, when he sold the wool; or, if not then, upon January 12, 1878, the date of the plaintiff's demand.

The judge thereupon found for the plaintiff. If, upon the facts found and the rulings, or any of them, the plaintiff was entitled to recover, by agreement of parties the case was to be sent to an assessor to determine the plaintiff's damages, according to the rules prescribed by the court, and judgment entered for the amount of damages found by such assessor; otherwise, the finding to be set aside and a new trial ordered.

The case was argued at the bar, in March 1880, by *G. O. Shattuck & O. W. Holmes, Jr.*, for the defendant, and by *H. W. Paine & R. D. Smith*, (*M. M. Weston* with them,) for the plaintiff; and was reargued, in November 1881, by *Shattuck & Holmes*, for the defendant, and by *Smith*, (*Weston* with him,) for the plaintiff; and was again reargued, in January 1883, by *Shattuck & W. A. Munroe*, for the defendant, and by *Smith*, (*Weston* with him,) for the plaintiff.

FIELD, J. It is convenient to consider this case, in the first instance, as if Jones originally had no interest in this wool, and had none at any time except what he derived from the plaintiff, and then to consider what is the effect upon the rights of the parties of the facts, that the wool was originally bought by Fessenden "upon joint account with Jones, under an arrangement between them, by which Fessenden was to buy the wool of the farmers in Vermont, and Jones was to find the money (either furnishing it himself or procuring some one else to advance upon the wool) and have control of the sale of it in Boston, and the profits were to be divided between them," and that Jones under this arrangement procured the advances to be made by the plaintiff, and furnished other money of his own, and retained his interest in the wool until the sale of it by the defendant.

Disregarding then this interest of Jones, the plaintiff was the consignee of the wool for sale on account of Fessenden, to whom he had made advances; the wool had been shipped to him for sale, and railroad receipts and invoices sent him; the wool had been received, and, by the plaintiff's orders to the railroad

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company, had been delivered to a truckman and stored in the lofts of Jones.

The report finds that "Jones had no authority from the plaintiff to sell said wool as a factor or consignee, but said wool was entrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for and to negotiate sales of the same, to be reported to and settled by the plaintiff, in whose name the bills of sale were made, and who collected the price."

The meaning of the clause that the wool was entrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, as qualified by the words which follow, and other words of the report, is that the wool was stored with Jones in order that it might be sold, and that Jones was authorized as a broker to negotiate sales, to be reported to the plaintiff, the terms of which were to be settled by him. Jones had no express authority to make and conclude sales himself, and, as a warehouseman, he had no such implied authority. He was not therefore either a "factor or other agent entrusted with the possession of merchandise for the purpose of sale," within the meaning of the Gen. Sts. *c.* 54, § 2. (And this section does not give validity to a pledge. *Michigan State Bank* v. *Gardner*, 15 Gray, 362.) Nor was he "a person entrusted with merchandise, and having authority to sell or consign the same," within the meaning of the Gen. Sts. *c.* 54, § 3. In these sections the words "for the purpose of sale," and the words "having authority to sell," mean much the same thing; which is, that in the one case the factor or other agent is entrusted with the possession of the merchandise "for the purpose of sale" by him, so that he can himself make a sale and transfer the title to the merchandise; and, in the other, that the person entrusted with the merchandise has, as a person so entrusted, authority given him to sell or consign it. The same construction must be given to similar words in § 4. See *Stollenwerck* v. *Thacher*, 115 Mass. 224; *Nickerson* v. *Darrow*, 5 Allen, 419.

A warehouseman who is also a broker, with authority only to receive offers for merchandise stored with him as warehouseman, and report them to his principal, who concludes the sale, if any is made, is not within the provisions of either of these sections.

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The pledge of this wool to the defendant, therefore, is not protected by the statute; and the facts show that it was made by Jones without any authority from the plaintiff, and without any acts done by the plaintiff whereby the defendant was misled into the belief that Jones had any such authority, whether as owner or otherwise. The fact that he found the wool in the store of Jones, which he knew was used by Jones "to store wool as a warehouseman for other persons, and also wool belonging or consigned to himself," does not bring the case within the decisions upon ostensible or apparent ownership. Neither the railroad receipt nor the invoice was delivered by the plaintiff to Jones, but both were retained by the plaintiff; and Jones, so far as it appeared to the defendant, was no more the ostensible owner of this wool than of any other wool stored with him as warehouseman. The assertion of Jones that he owned the wool was incompetent, as evidence of ownership, against the plaintiff, and could not enlarge his authority as agent. *Mussey* v. *Beecher*, 3 Cush. 511. *Stollenwerck* v. *Thacher*, *ubi supra*.

There remains to be considered the effect upon the rights of the parties of the interest which Jones had in the wool. It is perhaps not important to determine exactly the respective rights of Fessenden and Jones under their agreement; but we assume that Fessenden and Jones were partners in this adventure, with the right in Jones as against his copartner of controlling the sale of the wool in Boston; and, for the purpose of considering the principal questions in this case, we shall treat Jones as the general owner.

It is argued that, as Jones was the general owner, and had all the rights of an owner to sell or pledge the wool, the lien of the plaintiff was lost by the plaintiff's delivering possession of it to Jones in the manner and under the circumstances which have been stated in the report. Whatever the authority of Fessenden, under his agreement with Jones, may have been to consign the wool to the plaintiff, it is plain that, if the plaintiff had retained possession of the wool, he would have had a valid lien upon it for his advances against Jones, both by virtue of the Gen. Sts. *c.* 54, § 1, and by the general principles of law, because Jones had procured the consignment to be made to the plaintiff, and by his acts was estopped from setting up, against

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the plaintiff, any title to the wool inconsistent with the validity of the lien acquired by the plaintiff as consignee. The interest of the plaintiff in this merchandise was that of a consignee for sale who had made advances upon it, and his rights and duties in most respects are well defined in the law. The possession of a warehouseman, although he has a lien for his charges, is not inconsistent with the possession of the consignee, and it is in accordance with the usage of commission merchants to store merchandise consigned to them in warehouses. A consignee's rights in the merchandise are not lost by putting the merchandise in the warehouse of another person, to be stored until it can be sold. The plaintiff never intended to relinquish his lien, or even to put the property into the possession of the owner; but it is argued that, as he did intend to put it into the possession of Jones, who was the owner, although the plaintiff did not know it, this union of possession and general property in Jones enabled him to convey a good title to an innocent pledgee for value. No decided case has gone so far as this. It has not even been decided in this Commonwealth, that, if the plaintiff had known that Jones was the owner of the merchandise, the deposit of it in good faith with him as a warehouseman, with authority to negotiate sales as a broker, to be concluded by the plaintiff, would have enabled Jones to vest a good title in an innocent purchaser by a sale made by him on his own account. *Macomber* v. *Parker*, 14 Pick. 497. *Walker* v. *Staples*, 5 Allen, 34. *Thayer* v. *Dwight*, 104 Mass. 254. See *Casey* v. *Cavaroc*, 96 U. S. 467; *Clark* v. *Iselin*, 21 Wall. 360; *Thompson* v. *Dolliver*, 132 Mass. 103.

In this Commonwealth, although a sale of personal chattels is not valid against a subsequent purchaser, without delivery, yet, if there has been a delivery, possession by the vendor is only evidence of fraud, and the sale is not void against a subsequent purchaser, unless fraud in fact is proved. *Zuchtmann* v. *Roberts*, 109 Mass. 53. *Ingalls* v. *Herrick*, 108 Mass. 351. *Thorndike* v. *Bath*, 114 Mass. 116. *Dempsey* v. *Gardner*, 127 Mass. 381.

In conditional sales, possession by the vendee does not enable him to convey a good title to a purchaser. The cases here and elsewhere are numerous where the pledgee has lost his lien by

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delivering the pledge to his pledgor, to be used by him or to be held by him for his own use, or to be held by him with a right to substitute other property for that originally pledged; but possession obtained by the pledgor by force or fraud has never yet been held to destroy the lien of the pledgee, unless the delivery, although fraudulently obtained, was with the intention on the part of the pledgee that the pledgor might treat the pledge as his own property. The mere fact that the pledgor has possession, so that in him the possession and the general ownership are united, does not, as matter of law, destroy the lien of the pledgee, without regard to the circumstances under which, or the purpose for which, the possession was obtained. *Macomber* v. *Parker*, *ubi supra*. *Walcott* v. *Keith*, 2 Foster, 196. To hold that the union of possession and general property in the same person, however acquired, necessarily destroys the special property of a consignee of merchandise, would enable warehousemen, who hold merchandise in store for commission merchants, to buy in the title of their consignors, and thus obtain full control over the disposition of the merchandise stored, without the authority or knowledge of the consignees.

In all the cases cited by the defendant * in which it has been held that the lien of a pledgee was lost, the property pledged had been delivered to the pledgor by the pledgee, knowing him to be the pledgor, and the pledgor had been authorized to hold the property, or to make some use or disposition of it for his own benefit in a manner inconsistent with keeping it solely as agent, and for the benefit, of the pledgee, except the case of *Geddes* v. *Bennett*, 6 La. An. 516, and there the circumstances were such as in the opinion of the court to estop the plaintiffs from claiming their lien, even if they had one, which it seems they had not as against third persons, because the provisions of the Code of Louisiana had not been complied with.

* The defendant cited on this point *Bodenhammer* v. *Newsom*, 5 Jones (N. C.) 107; *Geddes* v. *Bennett*, 6 La. An. 516; *Way* v. *Davidson*, 12 Gray, 465, 467; *Walker* v. *Staples*, 5 Allen, 34; *Kimball* v. *Hildreth*, 8 Allen, 167; *Thompson* v. *Dolliver*, 132 Mass. 103; *McFarland* v. *Wheeler*, 26 Wend. 467; *Black* v. *Bogert*, 65 N. Y. 601; *Farmers & Mechanics' Bank* v. *Logan*, 74 N. Y. 568; *Day* v. *Swift*, 48 Maine, 368; *Collins* v. *Buck*, 63 Maine, 459; *Casey* v. *Cavaroc*, 96 U. S. 467, 485; *Tatham* v. *Andree*, 1 Moore P. C. (N. S.) 386.

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But it is unnecessary to consider what would be the result, if the interest which Jones had in the merchandise had been known to the plaintiff. The want of such knowledge is decisive. The plaintiff cannot be held to have intended that Jones should exercise any of the rights of ownership over the merchandise on account of his delivery of it to him, because he did not know that Jones was an owner, and it was not a consequence naturally to be expected from delivering the merchandise to him to be stored that it would come into the possession of the general owner; and in no legal sense can the plaintiff be said to have voluntarily delivered the merchandise into the hands of the general owner. In the absence of any act or conduct which, in law, prevents a consignee of merchandise for sale from setting up his rights of property by reason of an apparent ownership or authority to sell which he has conferred upon another, those rights are lost only by his dealing with the merchandise in a manner inconsistent with the bailment, or inconsistent with his possession and preservation of the merchandise solely for the purpose of sale under the consignment, or by dealing with it in such a manner that an intention to abandon or relinquish his rights can be inferred.

In this case there has been no such dealing with the merchandise, and no such intention can be inferred. The right which Jones had as owner to sell his interest in the property, subject to the right of the plaintiff, is not an authority to sell within the meaning of the Gen. Sts. *c.* 54. That chapter has no reference to the right of an owner of merchandise to sell as owner, but to the authority to sell given to consignees, factors, agents, or other persons entrusted with the possession of merchandise. See *Jenkyns* v. *Usborne*, 7 Man. & G. 678; *Fuentes* v. *Montis*, L. R. 3 C. P. 268, and L. R. 4 C. P. 93.

The rulings of the justice before whom this case was tried were therefore correct; and the defendant has converted the wool to his own use. It was a conversion when the wool was taken from the possession of Jones by order of the defendant, under a claim of a right of property in it, and was stored with Drake and Company, subject, and deliverable only, to the order of the defendant. *Stanley* v. *Gaylord*, 1 Cush. 536. *Moody* v. *Blake*, 117 Mass. 23. *Bearce* v. *Bowker*, 115 Mass. 129.

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The justice before whom the case was tried found for the plaintiff, and reported the case to the full court, with the statement that, "if the plaintiff was entitled to recover, by agreement of parties, the case was to be sent to an assessor to determine the plaintiff's damages, according to the rules prescribed by the court." The ordinary rule of damages is the market value of the property at the time of the conversion, with interest from that time, and a consignee of merchandise is entitled to recover full damages, and is responsible over to his consignor for any balance remaining after satisfying his claims upon the property. *Ullman* v. *Barnard*, 7 Gray, 554.

Whether the amount of the damages, thus estimated, is greater than the amount of the money for which the plaintiff had a lien on the property, the report does not show; and, if so, whether the defendant has so far succeeded to the rights of the owners that he is entitled to retain or deduct from these damages the surplus which remains after satisfying the claims of the plaintiff, the report does not enable us accurately to determine. See *Chamberlin* v. *Shaw*, 18 Pick. 278, 283; *Spoor* v. *Holland*, 8 Wend. 445; *Ingersoll* v. *Van Bokkelin*, 7 Cow. 670.

In accordance with the terms of the report, an assessor must be appointed to assess damages as of the full value of the property; but, if desired by the defendant, he may have authority, as auditor, to hear and report any facts, in addition to those found in this report, bearing upon the right of the defendant to retain the surplus, if any, remaining after satisfying the claims of the plaintiff upon the property.

Ordered accordingly.

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EDWARD G. BYINGTON & another *vs.* LUCY SIMPSON.

Suffolk. January 10. — 22, 1883. FIELD & W. ALLEN, JJ., absent.

That a person knew, when he entered into a contract in writing not under seal, purporting on its face to be made on the other part by A. and signed by "A., agent," that A. was in fact contracting as agent for B., will not prevent him from maintaining an action against B. on the contract.

HOLMES, J. This is a suit to recover a balance due under a building contract. The contract was in writing, and purported on its face to be made by the plaintiffs with J. B. Simpson. It provided that the work should be done under the direction of J. B. Simpson, agent, and was signed "J. B. Simpson, agent." J. B. Simpson was in fact contracting as agent for the defendant, his wife, and this was known to the plaintiffs at the time the contract was made.

The defendant contends that she was not bound by this contract under the foregoing circumstances. The fact that the contract purports to be under seal, although not sealed, has not been relied on as affecting the case, which, especially in view of the inartificial nature of the instrument, it ought not to do; but the argument is, that, inasmuch as the plaintiffs knew of the existence of a principal before the contract was made, and then were contented to accept a written agreement which on its face bound the agent, they must be taken to have dealt with, and to have given credit to, the agent alone; just as, upon a subsequent discovery of the undisclosed principal, they might have determined their right to charge him by a sufficient election to rely upon the credit of the agent.

We are of opinion that the plaintiffs' knowledge does not make their case any weaker than it would have been without it. Whatever the original merits of the rule, that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency. *Huntington* v. *Knox*, 7 Cush. 371, 374. *Eastern Railroad* v. *Benedict*, 5 Gray, 561. *Lerned* v. *Johns*,

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9 Allen, 419. *Hunter* v. *Giddings*, 97 Mass. 41. *Exchange Bank* v. *Rice*, 107 Mass. 37, 41. *National Ins. Co.* v. *Allen*, 116 Mass. 398. *Higgins* v. *Senior*, 8 M. & W. 834, 844. And it is evident that words which are sufficient on their face, by established law, to bind a principal, if one exists, cannot be deprived of their force by the circumstance that the other party relied upon their sufficiency for that purpose. Yet that is what the defendant's argument comes to. For the same parol evidence that shows the plaintiff's knowledge of the agency may warrant the inference that the plaintiffs meant to have the benefit of it and to bind the principal.

The only reasons which have been offered for the admissibility of oral evidence to charge the alleged principal confirm this conclusion. That suggested in *Higgins* v. *Senior*, *ubi supra*, is the same which is usually given for the liability of a master for his servant's torts, that the act of the agent is the act of the principal; (see 1 Bl. Com. 432; *Laugher* v. *Pointer*, 5 B. & C. 547, 553; *Williams* v. *Jones*, 3 H. & C. 602, 609;) the meaning of which, in its latter application at least, is, as was stated long ago, that master and servant are "fained to be all one person." West's Symboleography, Part I. sect. 8, "Of the Fact of Man." The most plausible explanation which has been attempted pursues the same thought more clearly. It is said that the principal is liable "because he is taken to have adopted the name of the [agent] as his own, for the purpose of [the] contract." 2 Smith Lead. Cas. (8th ed.) 408, note to *Thomson* v. *Davenport*. *Trueman* v. *Loder*, 11 Ad. & El. 589, 595; *S. C.* 3 P. & Dav. 267, 271. If this is to be accepted, there is obviously the strongest ground for saying that the principal has adopted the agent's name for the purposes of a given contract when it is shown that both parties have acted on that footing.

The most that could fairly be argued in any case would be, that, under some circumstances, proof that the other party knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was

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himself the principal. But these are questions of fact, and, as a matter of fact, it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her.

The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction.

Our decision is in accordance with a thoroughly discussed English case which went to the Exchequer Chamber, and with the statement of the law by Mr. Justice Story there cited. *Calder* v. *Dobell*, L. R. 6 C. P. 486. Story Agency, § 160 *a*.

Judgment for the plaintiffs affirmed.

J. H. Benton, Jr., for the defendant.

S. L. Powers, (*G. W. Sanderson* with him,) for the plaintiffs.

JAMES RILEY *vs.* ANDREW H. HENDERSON.

Suffolk. January 15. — 22, 1883. FIELD & W. ALLEN, JJ., absent.

Under the St. of 36 & 37 Vict. c. 85, § 7, a seaman is bound by shipping articles, which describe the contemplated voyages of the vessel as follows: "From Cardiff to Point de Galle, and or any other ports or places, trading in any direction or rotation, calling for orders when required, and not to extend beyond the 60th degree north latitude; and not south of 60 degrees south latitude, until the ship's arrival at a final port of discharge on the continent of Europe and or the United Kingdom at the master's option, the voyage not to exceed three years."

CONTRACT for seaman's wages. Trial in the Superior Court, before *Pitman*, J., who reported the case for the determination of this court, in substance as follows:

It appeared in evidence that the plaintiff was duly shipped at Calcutta, in February 1881, on the British ship Lorenzo, of which the defendant, a citizen of Great Britain, was master, for a voyage described in the shipping articles as follows: "From Cardiff to Point de Galle, and or any other ports or places, trading in any direction or rotation, calling for orders when required, and not to extend beyond the 60th degree north latitude; and

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not south of 60 degrees south latitude, until the ship's arrival at a final port of discharge on the continent of Europe and or the United Kingdom at the master's option, the voyage not to exceed three years." The articles also contained the following clause: "Any member of the crew claiming his discharge at any port or places in the United States of America to be paid off at one shilling per month wages."

These articles were signed by the plaintiff, and by the defendant as master; and the objection to their validity was based solely on the description of the voyage therein contained.

The plaintiff served on the ship as seaman until the ship's arrival at the port of Boston, in June 1881, and there, before the completion of the voyage for which he had shipped, left the ship under such circumstances, and with such action on the part of the master thereon, as to make him a deserter, and to forfeit any claim for wages, and to render him liable for money previously paid him on account by the master, provided his contract of shipment was a valid one and binding upon him.

If his contract of shipment was invalid, the plaintiff was not a deserter in leaving the ship at the port of Boston; and, at the rate of wages called for by the contract, there remained due to him, to the time he left the ship in Boston, the sum of $33.10. Another seaman was shipped at Boston by the master in his stead.

The Merchant Shipping Act of Great Britain of 1854 (17 & 18 Vict. *c.* 104), and the amendment thereto of 1873 (36 & 37 Vict. *c.* 85), were in evidence. The 17 & 18 Vict. *c.* 104, § 149, is as follows: "The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof." Then follow several terms, of which the only one material in this case is the first, which is

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as follows: "The nature, and, as far as practicable, the duration of the intended voyage or engagement." Provision is made by § 205 for the return of the seaman to the home port, in case his service terminates at any place out of the British dominions. The 36 & 37 Vict. *c.* 85, which by its terms is to be construed "as one with the Merchant Shipping Act, 1854, and the acts amending the same," provides, in § 7, that "any agreement with a seaman made under section one hundred and forty-nine of the Merchant Shipping Act, 1854, may, instead of stating the nature and duration of the intended voyage or engagement as by that section required, state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend."

The defendant offered to prove, and it was admitted by the plaintiff, that the provisions of said act and amendment were also in force concerning shipments on British ships at Calcutta in the British empire of India.

Upon the foregoing evidence, which was all the evidence at the trial, the judge ruled that the contract of shipment was valid and binding upon the plaintiff; that he was a deserter in leaving the ship at Boston; and that the action could not be maintained; and ordered a verdict for the defendant.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, judgment for the plaintiff for $33.10.

J. M. Browne, for the plaintiff. 1. The St. of 1873 (36 & 37 Vict. *c.* 85, § 7) is an amendment to the Merchants' Shipping Act of 1854, and, as the amendment is to be construed as one with the shipping act of 1854, it follows that the St. of 1854, having received a judicial construction long before the amendment of 1873 was passed, and the amendment still permitting the agreement to be drawn under the St. of 1854, the legal inference is that the same degree of definiteness is to be observed in drawing a shipping agreement under the amendment as is necessary under the St. of 1854. Under the St. of 1854, the shipping articles are clearly invalid. *Roberts* v. *Knights*, 7 Allen, 449. *The Westmorland*, 1 W. Rob. 216.

2. If it be conceded that the voyage is not to extend beyond the degrees of latitude named in the articles, still the two clauses in the articles, "$\frac{\text{and}}{\text{or}}$ any other ports or places," and

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"trading in any direction or rotation," are too vague and indefinite for a valid and binding agreement. *The Minerva*, 1 Hagg. Adm. 347, 361. *The Countess of Harcourt*, 1 Hagg. Adm. 248. *The George Home*, 1 Hagg. Adm. 370, 375.

3. There is no fixed terminus at which the seaman is to be discharged; but, on the other hand, the master may discharge him anywhere in the United Kingdom, or at any port on the continent of Europe, at his option; consequently the articles are defective for this reason. Furthermore, a large portion of the continent of Europe is beyond the limit of the 60th degree north latitude, thus rendering the vagueness of the articles still more evident. *The Crusader*, 1 Ware, 437.

4. If the articles are to be construed as entered into under the St. of 1873, the places or ports of the world, if any, must be stated to which the voyage is not to extend; if they are not so stated, the articles cannot be held valid. In the present instance, it is declared in the articles that the voyage is not to extend beyond the 60th degree north latitude, &c., and at the same time no mention is made of any ports or places within the limits of the 60th degree north latitude and the 60th degree south latitude to which the voyage is not to extend; whereas, as a matter of geographical knowledge, the larger part of Hudson's Bay, all of James's Bay, and all of Ungava Bay, lie between the equator and the 60th degree north latitude, and cannot be reached by any ship except she make a voyage of nearly five hundred miles beyond the 60th degree north latitude to reach them; and as these places are not named, and as the voyage is not to extend beyond the 60th degree north latitude, the articles are fatally defective.

5. The articles are to be construed most strongly against the master and owners. *The Minerva*, 1 Hagg. Adm. 355. *Wope* v. *Hemenway*, 1 Sprague, 300. *The Gem*, 1 Lowell, 180, 184. *The Ella Franklin*, 1 Lowell, 191.

J. D. Bryant, for the defendant, cited *The Hermine*, 3 Sawyer, 80; *The Latona*, 2 Stuart Vice Adm. 203.

C. ALLEN, J. Under the amendment to the Merchant Shipping Act of Great Britain, passed in 1873, the agreement need contain no further description of the voyage than its maximum period, and the places or parts of the world (if any) to which it

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is not to extend. The agreement in question contained both of these particulars with sufficient distinctness. No other objection being made to its validity, the entry must be

Judgment on the verdict.

ANN O. TUTTLE *vs.* TRAVELLERS' INSURANCE COMPANY.

Middlesex. Nov. 15, 1882. — Jan. 5, 1883. W. ALLEN & HOLMES, JJ., absent.

Under a policy of insurance against accident, providing that no claim shall be made under it when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger, and containing a condition that the assured is required to use all due diligence for personal safety and protection, no recovery can be had for the death of the assured, which is caused by his being struck by a railroad train, while running along the tracks in front of it in the night-time, for the purpose of getting on a train approaching in an opposite direction on a parallel track.

CONTRACT upon a policy of insurance against accident, issued by the defendant corporation upon the life of Stephen Tuttle, and made payable to the plaintiff, his wife.

At the trial in this court, before *Devens*, J., the evidence showed that, about ten o'clock in the evening of March 13, 1879, Tuttle was killed by being struck by a railroad train, while running along the tracks in front of it, for the purpose of getting on a train approaching in an opposite direction on a parallel track. The judge, at the defendant's request, ruled that the action could not be maintained; directed the jury to return a verdict for the defendant; and reported the case for the consideration of the full court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be had. The material provisions of the policy appear in the opinion.

G. A. A. Pevey, for the plaintiff.

S. Lincoln, for the defendant.

C. ALLEN, J. The policy provides, among other things, that no claim shall be made under it "when the death or injury may have happened in consequence of exposure to any obvious or

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unnecessary danger." It is also made subject to the condition, that "the party insured is required to use all due diligence for personal safety and protection." Both of these provisions were violated by the act of the deceased in going upon and along the track of the railroad, under the circumstances stated in the report. *Wright* v. *Boston & Maine Railroad*, 129 Mass. 440, 443. No two cases are precisely alike in their facts; and what constitutes due care must depend upon the facts of each case. But the conduct of the deceased was such as, in the words of Mr. Justice Colt, is "condemned by the general knowledge and experience of all prudent men, and is conclusive on the question of due care." The danger was obvious, the exposure to it unnecessary, the want of due diligence clear; and the death of the insured occurred in consequence thereof. See also *Wills* v. *Lynn & Boston Railroad*, 129 Mass. 351; *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75; *Allyn* v. *Boston & Albany Railroad*, 105 Mass. 77; *Cordell* v. *New York Central & Hudson River Railroad*, 75 N. Y. 330; 70 N. Y. 119; 64 N. Y. 535; *Baxter* v. *Troy & Boston Railroad*, 41 N. Y. 502; *McCarty* v. *Delaware & Hudson Canal*, 17 Hun, 74.

The plaintiff contends that it was not the exposure or negligence of the assured which caused his death, but the coming upon him of the locomotive engine, the bell or whistle of which may not have sounded; that this was a new force or power which intervened, of itself sufficient to stand as the cause of the misfortune; that it was for the jury to determine whether or not the railroad corporation was negligent; and that, if so, the negligence of the assured, if it existed, was too remote to defeat the policy. *Insurance Co.* v. *Tweed*, 7 Wall. 44, 52. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, 475. *Scheffer* v. *Railroad Co.* 105 U. S. 249, 252. But, without speculating as to possible cases, we do not think that the doctrine relied on is applicable to this case. If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of this policy was not intended and understood to be applicable to such a case. For example, if one while walking on a railroad track is assaulted by a robber or a dog, or is struck by lightning, his act of travelling there has

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no tendency to produce the injury, and is not to be deemed a contributory cause thereof. But, on the other hand, if one who goes into a battle is hit by a bullet, or if one who goes up in a balloon is blown out to sea by the currents of air, or if one who makes a railroad track his path for travel is run over by a passing locomotive engine, he must ordinarily in any legal question be held to take the risk of those results. There is in each of these cases such an association of cause and effect, that the one must be held to have contributed to the other. To hold that the death of the assured in the present case did not happen in consequence of his exposure to the risk, but from a new force or power which intervened, would be to fritter away the language of the policy by metaphysical distinctions too fine to enter into the understanding or contemplation of parties engaged in the practical business of making a contract of insurance. We must assume that the assured read his policy, and was acquainted with its language and attached some practical meaning to it. See *White* v. *Lang*, 128 Mass. 598; *McGrath* v. *Merwin*, 112 Mass. 467; *Norton* v. *Eastern Railroad*, 113 Mass. 366; *McDonald* v. *Snelling*, 14 Allen, 290; *Cluff* v. *Mutual Benefit Ins. Co.* 13 Allen, 308, 319; *S. C.* 99 Mass. 317, 329; *Harper* v. *Phœnix Ins. Co.* 19 Mo. 506. *Judgment on the verdict.*

WILLIAM J. HOLDEN and another *vs.* CHARLES A. UPTON.

Middlesex. Nov. 23, 1882. — Jan. 8, 1883. DEVENS & HOLMES, JJ., absent.

The treasurer of a savings bank, by virtue of his office merely, has no implied authority to transfer to a purchaser a promissory note belonging to the bank.

The receivers of a savings bank, which has illegally invested its deposits in a promissory note bearing the name of but one promisor, may maintain a bill in equity, against a person who is in possession of such note through an abuse of power by the treasurer of the bank, to compel the surrender of the note.

BILL IN EQUITY, filed January 8, 1880, by the receivers of the Reading Savings Bank, to restrain the defendant from prosecuting actions at law upon, and to compel the delivery to the plaintiffs of, certain promissory notes in the defendant's

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possession. The answer, among other things, alleged carelessness and negligence on the part of the trustees of the bank in the performance of their duties. Hearing before *W. Allen*, J., who reported for the consideration of the full court the following case:

It appeared that the notes in question were received by the bank for money borrowed of the bank, and remained in the bank as part of its assets for several years, until on or about May 1, 1878, when they were transferred to the defendant by Nathan P. Pratt, the treasurer of the bank, at its banking-house; that the defendant paid the money therefor to Pratt, who indorsed his own name on the back of the notes; that similar notes in amount and appearance were substituted by some person, among the notes and other securities of the bank, simulated so as to deceive the trustees of the bank; that neither the trustees nor the committee of investment of the trustees had any knowledge of the sale of the notes.

There was no evidence produced by the defendant to sustain that part of his answer alleging negligence or carelessness on the part of the trustees. No authority was shown to have been given to Pratt to sell or indorse the notes; and there was evidence tending to show that Pratt had fraudulently sold and assigned many other notes, and the mortgages securing the same, to other parties, without the consent or knowledge of the trustees; and that there had been placed in the bank, among its securities, duplicate forged notes and mortgages.

There was no evidence that Pratt had accidentally omitted to indorse the notes as treasurer of the bank, except the fact that he had not so done, but had indorsed upon each and all of them his individual name.

If, upon these facts, the bill could not be maintained, it was to be dismissed; otherwise, a decree was to be entered against the defendant, directing the delivery of the notes to the plaintiffs and the withdrawal of all suits thereon.

B. F. Butler, (*S. Bancroft* with him,) for the plaintiffs.

G. A. A. Pevey, (*E. A. Upton* with him,) for the defendant.

C. ALLEN, J. The report finds that no authority was shown to have been given to the treasurer to sell or indorse the notes in controversy; that neither the trustees nor the committee of

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investment had any knowledge of the sale; and that the defendant produced no evidence to sustain the averments of the answer as to any negligence or carelessness on the part of the trustees, whereby the treasurer was permitted by them for a long space of time to deliver and indorse the notes belonging to the corporation, in behalf of the corporation, to innocent parties, and to transact the general business of the bank according to his will and pleasure. There was no averment or proof of any general usage of savings banks to allow their treasurers to transfer notes. The question, therefore, presented by this case is, whether, in the absence of any actual authority, by statute, charter, by-law, vote, oral permission, understanding or assent, and of any usage of savings banks in general or of this particular bank, the treasurer, merely by virtue of his office, had an implied power to transfer to a purchaser the notes of the institution. No case is cited by counsel, and, after some research, we have found none, in which it has been held that he has such power; and, on principle, we have come to the conclusion that it is a safer and better rule to hold that he has not.

No doubt emergencies may arise, in the experience of a savings bank, in which it may be desirable or necessary to part with notes owned by it, and realize their value in money, before their maturity. It is however true, as a general proposition, that it is no part of the design of such an institution, ordinarily and as a part of its regular business, to trade in notes. *Commonwealth* v. *Reading Savings Bank*, 133 Mass. 16. According to the custom, which we believe to be universal, and which is recognized in the statutes, (Pub. Sts. *c.* 116, § 21,) each savings bank has a board of investment or investing committee, consisting of a certain number of its trustees, who are immediately and primarily responsible for the safe investment of its funds according to law. There is no specific statement or enumeration, in the statutes, of the powers and duties of the treasurer; but it is obvious that these will have reference to the nature of the things to be done by him in the ordinary course of the business of the institution. And while it is no doubt true that occasions may arise for a different practice, yet, according to the theory, and also as we believe to the custom, of savings banks, investments in notes are usually made with a view to holding them until

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their maturity, or at least without the expectation of frequent changes by sale.

The view which we take of this question does not trench at all upon the doctrine, that the authority of agents or officers of a corporation need not appear by vote, and that the public, in dealing with such agents or officers, may safely confide in the existence of such authority, not inconsistent with the charter, as is openly and habitually exercised. *Lester* v. *Webb*, 1 Allen, 34. *Case* v. *Bank*, 100 U. S. 446, 454. Nor need it cast any doubt upon the authority of a treasurer of a savings bank, who usually receives payment of notes due to the corporation, to surrender to the makers of notes, which are paid, such collateral securities as may be held therefor, and to execute such transfers as may be necessary to revest the property in the original owners.

It is next contended, on the part of the defendant, that the notes in question bore the name of but one promisor, and that they were not such notes as savings banks may lawfully take; and it is urged that therefore no remedy exists against the defendant, even if the act of the treasurer was unauthorized or fraudulent. But this argument overlooks the true nature of the question. We are not to consider whether the trustees, under such circumstances, might be held amenable to any legal consequences. But the deposits are trust funds, held for the benefit of the depositors. If, by intentional evasion of the statutory requirements, or by looseness of practice or inadvertence, improper investments of these or any other trust funds are made, the trust nevertheless attaches to the investments; and the remedy, either of the trustees or of the *cestuis que trust*, in availing themselves of the security so improperly taken, is not impaired by the breach of trust. If a trustee has lent trust money in an unauthorized manner, he not only may recover it back from the borrower, but it is his duty to do so. *Payne* v. *Collier*, 1 Ves. Jr. 170. *Greenwood* v. *Wakeford*, 1 Beav. 576. *Fuller* v. *Knight*, 6 Beav. 205, 211. *Bancroft* v. *Consen*, 13 Allen, 50. This doctrine applies to the present case. *Farmington Savings Bank* v. *Fall*, 71 Maine, 49. *National Pemberton Bank* v. *Porter*, 125 Mass. 333.

A bill in equity is the proper remedy. See next case.

Decree for the plaintiffs.

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WILLIAM J. HOLDEN & another *vs.* ELI W. HOYT & another.

Middlesex. Nov. 23, 1882. — Jan. 8, 1883. DEVENS & HOLMES, JJ., absent.

A corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, if such third persons have not acted on or seen or known of the existence of the matters so interpolated and appearing to be a part of the records.

A bill in equity may be maintained, by the owner of a promissory note and a mortgage securing it, to restrain a sale of the property covered by the mortgage, and to compel the surrender of the note and mortgage, by a person claiming to hold them under a transfer fraudulently made to him by an agent of the owner.

BILL IN EQUITY, filed June 21, 1879, by the receivers of the Reading Savings Bank, against Eli W. Hoyt and Franklin Fletcher, which, as amended, alleged that, on January 19, 1872, Fletcher conveyed by mortgage deed to said bank a certain parcel of land, with the buildings thereon, situated in Reading; that said property since that date has been the property of the bank; that said property was to be sold by public auction on June 21, 1879, by virtue of a power of sale contained in said mortgage; that the defendant Hoyt claimed to be the assignee of said mortgage by virtue of an assignment dated July 31, 1878, made by Nathan P. Pratt, the then treasurer of said bank; that said assignment, if any was made, was void and of no effect, because made without authority and without right, and in fraud of the bank; that Pratt never made and executed said supposed assignment to Hoyt; and that Pratt never indorsed or assigned to Hoyt, or any other person, the note secured by said mortgage. The prayer of the bill was for an injunction to restrain Hoyt from selling said land, and that said assignment might be declared null and void; and for other relief.

The answer of the defendant Hoyt alleged, among other things, that the note and mortgage were assigned to him by Pratt, in pursuance of authority given to him by the proper officers of the bank, for a good and valid consideration paid by the defendant to the bank; and that they were his property.

When the case came on for hearing, before *Soule*, J., the defendants contended that the plaintiffs had a complete and adequate remedy at law. The judge declined so to rule. The

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case was then heard upon the merits; and the judge reported, for the consideration of the full court, the following case:

It was proved that Nathan P. Pratt was the treasurer and secretary of the bank at the time the assignment and indorsement purported to be made, and had been for some years before; that Hoyt negotiated with one Thompson, the agent of Sidney P. Pratt, a son of Nathan P. Pratt, for the purchase of the note and mortgage in question; that Sidney claimed to act for his father, and evidence was introduced tending to show that he did so act; that the full amount of the note and interest was paid to Sidney by a cashier's check on a national bank; that Sidney delivered the note and mortgage, with an assignment thereon purporting to be executed by the savings bank by Nathan P. Pratt, its treasurer and secretary. There was evidence tending to show that the check given to Sidney for said assignment and indorsement was deposited, on the day it was received, in the Blackstone National Bank, to the credit of Nathan P. Pratt as an individual, not as treasurer. The check was produced, and upon it appeared the name of Nathan P. Pratt as indorser to the Blackstone National Bank. This indorsement was claimed to be a forgery by the plaintiffs, which was denied by the defendants. The books of record of the savings bank were produced, and the following vote appeared upon the records of the trustees, passed on May 3, 1876, the year before the date of the assignment: "Upon motion of C. P. Judd, one of the trustees, voted the treasurer be authorized to assign, discharge and release all mortgages belonging to the bank." The plaintiffs offered evidence tending to prove that the record of this vote had been altered since it was recorded, the word "assign" being added. C. P. Judd was called as a witness, and testified that he never made the motion to give authority to assign mortgages, but only to release and discharge them. Evidence was introduced on both sides as to the signature of Nathan P. Pratt to the assignment and the indorsements upon the note and check.

Evidence was also introduced to show that a duplicate or forged fac-simile of this note and mortgage, with all the indorsements and stamps thereon, except the indorsements of transfer, was deposited with the mortgage securities of the bank

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in place of the original; and also that many other like forged duplicates of other mortgages, that had been taken from the bank by Sidney P. Pratt or Nathan P. Pratt, had been placed among the mortgage securities of the bank, and the same had been accepted as genuine by the committee of the trustees in auditing and passing upon the treasurer's accounts; and that a part of the original mortgages, in place of which said forged duplicates were put, had been assigned by Nathan P. Pratt in the name of the bank, signing his name as treasurer, and a part of the same were delivered to other persons, with a forged assignment of Nathan P. Pratt thereon.

Upon the evidence, the judge found as facts, that the signature of Nathan P. Pratt to the assignment and indorsement was not in his handwriting; that the record of the vote of May 3, 1876, had been altered at some time since it had been originally made, and that the vote as passed did not authorize the treasurer to assign mortgages; that there was no evidence to show when this alteration of the record was made, except that it was before the plaintiffs took possession of the records, upon their appointment; that the cashier's check given for the assignment of the note and mortgage was deposited to the credit of Nathan P. Pratt in his individual capacity, not as treasurer, and that the amount so deposited was drawn out by him by his checks within ten days of its being so deposited; and that the evidence was not sufficient to enable him to determine whether the signature of Nathan P. Pratt upon the back of said check was in his own handwriting or otherwise.

B. F. Butler, (*S. Bancroft* with him,) for the plaintiffs.

J. G. Abbott, for the defendants.

C. ALLEN, J. The defendants in this case do not rest their argument upon the ground, (which is covered by the decision in the preceding case,) that the treasurer had power to assign the note and mortgage merely by virtue of his office; but they contend that the records, containing the vote of the trustees, show full authority to make the assignment in question; that, as to third persons dealing innocently with the treasurer, the corporation is bound by its records as they stand; and that such third persons, who have invested their money on the faith of the records, ought not to suffer.

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In our opinion, the imperfection of this argument consists in this: that it is not alleged, and does not appear, that the defendants invested their money on the faith of the records. We have no doubt that the books and records of a corporation are *prima facie* evidence against it, as admissions; and, under some circumstances, may be conclusive evidence. But, at the most, a corporation can only be bound conclusively by its records, either when they are the records, duly made by the recording officer, of its proceedings, or when some person, who has had proper access to them, or knowledge of them, has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. And a corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, where such third persons have not acted on, or seen, or known of the existence of, the matters so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make due correction of the records, and that some innocent third person has been misled thereby. In the dissenting opinion of Mr. Justice Dewey, in *Amherst Bank* v. *Root*, 2 Met. 522, 544, while maintaining that, ordinarily, a corporation cannot control its own records by introducing oral testimony contradicting the facts as there stated, for the purpose of charging third persons, he nevertheless concedes and declares that the doctrine is not applicable to fraudulent alterations or interpolations. See also *Hart* v. *Frontino & Bolivia South American Gold Mining Co.* L. R. 5 Exch. 111, 114; *In re Bahia & San Francisco Railway*, L. R. 3 Q. B. 584; 1 Lindley on Part. (4th ed.) 141, 160.

The further objection is strongly relied on, that the plaintiffs have a plain, adequate and complete remedy at law, and therefore are not entitled to equitable relief. The only legal remedies suggested as sufficient are a writ of entry, and an action of replevin for the note and mortgage. The bill contains no averment that these are concealed, so that they cannot be come at to be replevied, and no prayer that they shall be delivered up to the plaintiffs. It is certainly true, that both the bill and the amended bill are somewhat meagre in their averments; but, by the bills and answer, the main issue is distinctly presented,

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whether the assignment to the defendant Hoyt was valid or not. As it now appears, the note and mortgage were trust funds, which it was the right and duty of the plaintiffs to get into their own possession, without delay. Hoyt claimed to own them, and had given notice of a sale of the land, which was to take place on the very day when the original bill was brought. The effect of such sale would have been to introduce a new claimant to the land. If the sale produced less than the amount due on the note, Hoyt would hold the note for the balance, and perhaps transfer it to still another person.

In order to prevent equitable jurisdiction, the remedy at law must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy*, 3 Pet. 210. *Watson* v. *Sutherland*, 5 Wall. 74. It is obvious, in the present case, that a writ of entry would not furnish adequate relief. The value of the land might be less than the amount of the note. The value of the note itself, as an investment, might be greater than the face of it. Even if, under the doctrine of *lis pendens*, a grantee from Hoyt would have no greater rights than Hoyt, the plaintiffs should not for this reason be deprived of the more effectual protection of an injunction. *Hood* v. *Aston*, 1 Russ. 412, 416. 2 Story Eq. Jur. § 908. The specific possession of the mortgage, even if obtainable by a writ of replevin, would not be an adequate protection, since purchasers might rely on the record. The remedy by replevin is at best of limited utility in such a case, either as to the mortgage or note, and is attended with the burden of giving a bond to the defendant in double the appraised value of the property replevied. In most instances, it probably would not be found available, by reason of the difficulty of obtaining the articles without a breach of the peace. Replevin as a possible remedy has existed not only by statute, but at common law. *Maxham* v. *Day*, 16 Gray, 213. *George* v. *Chambers*, 11 M. & W. 149. 3 Kent Com. 483, note *f*.

But, so far as we have observed, in all the cases heretofore decided, the objection that an action of replevin would have furnished an adequate remedy at law has been taken only in one case, namely, *Sears* v. *Carrier*, 4 Allen, 339; and it was not

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there sustained. An examination of the defendant's original brief in that case shows that no authority was cited in support of the objection; and none has been cited in this case. Compelling the delivery up of deeds and notes has been a common method of equitable relief. 1 Story Eq. Jur. § 700. *Hood* v. *Aston, ubi supra.* *Fuller* v. *Percival*, 126 Mass. 381. *Fish* v. *French*, 15 Gray, 520. *Pierce* v. *Lamson*, 5 Allen, 60. So also of other chattels having a somewhat special value. 1 Story Eq. Jur. §§ 708, 709. And especially, "where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power." *Wood* v. *Rowcliffe*, 3 Hare, 304; *S. C.* on appeal, 2 Phil. 382, 383. Under the general prayer for relief, all suitable relief may be granted. *Decree for the plaintiffs.*

HENRY BATES and another *vs.* HENRY EMERY.

Barnstable. Nov. 14, 1882. — Jan. 5, 1883. W. ALLEN & HOLMES, JJ., absent.

The builder of a vessel made an agreement with A., who had worked on the vessel for wages, that, when she was finished, A. should furnish sails, which were to remain A.'s property; and that A. should use her and give the builder a portion of her earnings. A., falsely representing that he owned the hull, made a contract with a sailmaker, under which the sails were furnished, and A. used the vessel under the agreement with the builder. *Held*, that the sailmaker could not maintain a petition, under the Gen. Sts. c. 151, §§ 12, 13, to enforce a lien against the vessel.

PETITION, under the Gen. Sts. *c.* 151, §§ 12, 13, to enforce a mechanic's lien against a boat called the Triumph. The respondent was defaulted, and Jonathan C. Small and George A. Taylor appeared as claimants. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

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The boat in question did not exceed five tons, old measurement, and was sloop-rigged. There was no evidence that she had ever been licensed or enrolled. Her hull, spars and rigging were built, in the winter of 1879, by Jonathan C. Small, who was a boat-builder, and who afterwards sold one half of her to the other claimant. The respondent Emery was employed by Small to assist in building the boat; and Small paid him wages for his work upon her, under an understanding between them that, when the boat was completed, Emery should furnish sails for her, which should be his property, and that he should use her for fishing and other purposes, and pay a certain lay or share of her net earnings to Small.

Upon the completion of the boat, Emery supplied her sails, and used her for fishing and other purposes, agreeably to said understanding, taking her sails into his custody, and controlling them as his property when the boat was laid up and not in use during the winter season.

Emery made a contract with the petitioners to furnish the labor and materials in making said sails, by declaring to them that he owned the hull of the boat, that he had paid for the materials used in building her, and had done enough work for Small to pay for Small's work on her. Induced and deceived by this statement of Emery, which was false, the petitioners performed labor and furnished materials in making said sails, as stated in the petition, and delivered them to Emery, who put them upon the boat as above stated.

Neither of the claimants personally made any contract, express or implied, or authorized Emery or any other person to make any such contract, for furnishing labor or materials in the making of said sails, with the petitioners or with any other person; nor did either of the claimants know, or have means or cause to know, that Emery had held himself out to the petitioners, or to any other person, as the owner of the hull of the boat, or of any part thereof except the sails; but Small was told by Emery that he got said sails of the petitioners, and had not paid for them.

The petitioners seasonably filed in the office of the clerk of the town of Chatham, on June 2, 1879, the statement required by law.

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Upon these facts, the judge ruled that the petition could not be maintained, and found and ordered judgment for the claimants. The petitioners alleged exceptions.

H. P. Harriman, for the petitioners. The respondent was in possession of said boat under a contract to pay a certain part or share of her net earnings to Small, and was thus a special owner, or owner *pro hac vice*. In the only case in which this question has been raised, it was decided that the word "owners" meant special as well as general owners, and that a person repairing a vessel under a contract with such special owner has a lien. *Hawes* v. *The James Smith*, U. S. D. C. Mass. Dist. before *Sprague*, J., 2 Pars. Ship. & Adm. 146, & note. See also *Webb* v. *Peirce*, 1 Curtis, 104; *The Sarah Harris*, 13 Blatchf. C. C. 503; *The Monsoon*, 1 Sprague, 37; 3 Kent Com. 188.

J. M. Day, for the claimants.

C. ALLEN, J. In order to create a lien upon a vessel, the labor must have been performed or the materials furnished by virtue of a contract, expressed or implied, with the owners, or with the agents, contractors or sub-contractors of such owners, or some one of them, or with some person having been employed to construct, repair or launch such vessel, or to assist them. The contract of Emery with the petitioners for the making of the sails did not fall within this description. He did not stand in any such relation to the owners as the statute contemplates; and they are not estopped to set up the true facts, by reason of his falsehoods to the petitioners. See *Morse* v. *Newbury School District*, 3 Allen, 307. *Exceptions overruled.*

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COMMONWEALTH *vs.* ANN MORRISON.

Plymouth. January 26, 1883. FIELD & W. ALLEN, JJ., absent.

A motion for a new trial, based upon reasons relating entirely to rulings or omissions to rule during the progress of the trial and before verdict, to which the aggrieved party had full opportunity to except but omitted to do so, is addressed to the discretion of the presiding judge, to the exercise of which no exception lies; and the Pub. Sts. *c.* 153, § 8, do not apply.

COMPLAINT alleging that the defendant, on June 5, 1881, and on divers other days and times between that day and October 24, 1881, at Rockland, unlawfully exposed and kept for sale intoxicating liquors. Trial in the Superior Court, before *Gardner*, J., who allowed a bill of exceptions, in substance as follows:

The government introduced evidence of sales of intoxicating liquors by the defendant on several occasions during the time covered by the complaint.

The government also called as witnesses two police officers, who testified that they were present at the trial of this complaint in the District Court; that, after her conviction, the court asked the defendant what she had to say as to her sentence on the conviction; and that the defendant answered, "that she had a large family, and had sold liquors to support them, and begged the mercy of the court, because she could not get along without selling liquors."

The defendant offered evidence tending to impeach the evidence of the government as to sales; and also denied that she made the statement in the District Court as testified to.

The judge gave general instructions, which were not objected to; and, in answer to a question by the jury, whether the confession of the defendant, regardless of other testimony, was sufficient to convict, instructed the jury that it was for them to determine what the above statement of the defendant related to, and what was the effect, provided they found that she made it; and that if they should find, upon all the evidence, that it related to the testimony which had been introduced, at the trial before the District Court, against her, and was an admission or confession by her, that, during the time charged in the

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complaint, she had sold liquors, substantially as testified to at the trial in the District Court, then they would be justified in convicting her; to which no exception was taken.

The jury returned a verdict of guilty; and, after verdict, the defendant moved for a new trial, assigning, among other reasons, the following: "3. Because the jury were instructed that the admission of the defendant, if proved, was sufficient evidence to convict her, if it related to the evidence before the District Court on the trial of this complaint. 4. The admission referred to was incompetent. 5. There was no evidence of a voluntary confession."

This motion was overruled; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

COLBURN, J. The only exception upon which the defendant relies, as the case is presented to us upon her brief, is to the overruling of the third, fourth and fifth grounds, or reasons, stated in her motion for a new trial. No authority is cited except the Pub. Sts. *c.* 153, § 8.

These reasons for a new trial relate entirely to rulings, or omissions to rule, during the progress of the trial and before verdict, to which the defendant had full opportunity to except, if she saw fit, but omitted to do so; and her motion for a new trial was addressed to the discretion of the court, and to the exercise of that discretion she has no ground of exception. *Lowell Gas Light Co.* v. *Bean*, 1 Allen, 274. *Kidney* v. *Richards*, 10 Allen, 419. *Phillips* v. *Soule*, 6 Allen, 150. *Whittaker* v. *West Boylston*, 97 Mass. 273. *McAllister* v. *Burrill*, 98 Mass. 334. *Behan* v. *Williams*, 123 Mass. 366.

There are cases of motions for new trials, based upon something which has occurred since the trial, or which was not known until after the trial, which raise questions of law, to the rulings upon which exceptions will lie, and it is to such cases that the statute upon which the defendant relies relates. *Lowell Gas Light Co.* v. *Bean*, *ubi supra*. *Woodward* v. *Leavitt*, 107 Mass. 453, 460. *Commonwealth* v. *Tobin*, 125 Mass. 203. *Munde* v. *Lambie*, 125 Mass. 367. *Exceptions overruled.*

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COMMONWEALTH *vs.* JOSEPH D. THYNG and others.

Suffolk. Nov. 27, 1882. — Jan. 3, 1883. DEVENS & HOLMES, JJ., absent.

On an indictment against A. and B. for fraudulently concealing leased personal property, there was evidence that A. took a mortgage upon the property from the lessee, in the name of C., and assigned the mortgage to B., who took possession of the property and concealed it. The government contended that the transaction between A. and B. was merely colorable; and called C. as a witness, who testified that A. had no written authority to assign the mortgage, but had verbal authority. *Held*, that the government could, under the Pub. Sts. c. 169, § 22, contradict the witness by showing that he had made inconsistent statements.

Merely asking a witness, whom it is sought to contradict, on reëxamination, whether he has made a certain statement to a particular person, with no attempt to designate the time or place, and no suggestion of any reason for not specifying them, or of circumstances which rendered them unnecessary, is not mentioning "the circumstances of the supposed statement sufficient to designate the particular occasion," within the Pub. Sts. c. 169, § 22.

INDICTMENT against Joseph D. Thyng, James P. Thyng, Luther Davis and William W. Campbell, for fraudulently concealing leased personal property. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

It appeared in evidence, that the defendant, Joseph D. Thyng, took a mortgage upon the property of one Richards, a portion of which was leased by one Ferdinand to Richards; and that Ferdinand had not parted with his title to the same. The mortgage was taken in the name of one Mason, as mortgagee; and there was evidence tending to show that Thyng was engaged in lending money, his own in part, and in part money furnished by others for him to lend in their names; that he had money in his hands to lend for Mason; and that he had used his own discretion in taking, holding, collecting, and, in some cases, selling, such mortgages.

It further appeared that the mortgage was taken on April 19, 1881; that, on April 21, Thyng wrote what purported to be a transfer of the note on the mortgage, upon the back of the same, to the defendant Davis, signing the name of Mason, affixing a seal, and adding under the signature the words, "By Atty., Joseph D. Thyng;" and that he then passed both note

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and mortgage into Davis's possession. Davis subsequently, claiming to be the owner of the note and mortgage, took actual possession of the property and removed it, and it was never afterwards found by the lessor.

It was contended by the government, that the transaction between Thyng and Davis, in assigning and delivering the mortgage and note, was merely colorable; that the parties were acting in concert in the removal of the property; that Thyng made use of Davis as a collector, and especially for the reason that he was not pecuniarily responsible.

Mason was called by the government as a witness. Among other things, he testified that Thyng was his agent, and had money belonging to him to lend, and had had for some time; that he had no knowledge of this particular mortgage, had never known Richards, the mortgagor, had never assigned the mortgage, and had never given Thyng any written authority whatever as to lending money, or taking or assigning mortgages. On cross-examination, he testified that Thyng had authority to do these acts, but that the authority was verbal; that he ratified his act in this case, and should have signed his own name if he had been asked to do so. On reëxamination, he was asked whether he had not made statements to Ferdinand in regard to this particular mortgage, that he knew nothing about it, that Thyng had no authority of any kind, either written or verbal, to transfer it or do what he had done regarding it; and he denied that he had made such statements. The defendants objected to this line of examination, and the attorney for the government stated that it was for the purpose of introducing evidence to contradict the witness in those particulars. The judge admitted the evidence. The government then offered the evidence of Ferdinand, that Mason told him that he knew nothing about the mortgage, and that he had given Thyng no power of attorney, or any written or verbal power of attorney; to which evidence the defendants objected, but the same was admitted.

The jury returned a verdict of guilty against the defendants Joseph D. Thyng and Davis; and Thyng alleged exceptions.

N. B. Bryant, for Thyng.

C. H. Barrows, Assistant Attorney General, for the Commonwealth, cited, to the first point, *Force* v. *Martin*, 122 Mass. 5;

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and to the second point, *Day* v. *Cooley*, 118 Mass. 524; *Brooks* v. *Weeks*, 121 Mass. 433; *Commonwealth* v. *Donahoe*, 133 Mass. 407.

W. ALLEN, J. Evidence that the defendant Thyng was not authorized by Mason to assign the mortgage was competent upon the question whether Davis, in removing and concealing the property, was acting for himself alone, or in concert with Thyng. The government therefore had a right, under the Pub. Sts. *c.* 169, § 22, after complying with the conditions of the statute, to contradict the testimony of its witness, Mason, given on cross-examination, by showing that he had made inconsistent statements. The statute provides that "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statements, and, if so, allowed to explain them." The witness was asked, on reëxamination, whether he had made such statements to a particular person. The particular occasion on which they were made was not otherwise designated. The case cannot be distinguished from *Ryerson* v. *Abington*, 102 Mass. 526. To render the evidence competent, it should appear that the conditions of the statute have been complied with; and we do not think that merely calling the attention of the witness to the person to whom the supposed statement was made, with no attempt to designate the time or place, and no suggestion of any reason for not specifying them, or of circumstances which render them unnecessary, is mentioning the circumstances "sufficient to designate the particular occasion" within the meaning of the statute. See cases cited in *Ryerson* v. *Abington*, *ubi supra*.

Exceptions sustained.

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COMMONWEALTH *vs.* JOHN CASEY.

Suffolk. Nov. 27, 1882. — Jan. 3, 1883. DEVENS & HOLMES, JJ., absent.

The Pub. Sts. *c.* 100, § 12, as amended by the St. of 1882, *c.* 259, § 1, providing that no licensee shall maintain, or permit to be maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind, shutter or other obstruction, in such a way as to interfere with a view of the business conducted upon the premises, or with a view of the interior of the premises, applies to a licensee who maintains such shutters upon his premises on the Lord's day, although he is prohibited from, and is not in fact, carrying on business on that day.

COMPLAINT to the Municipal Court of Boston, on the Pub. Sts. *c.* 100, § 12, alleging that the defendant, on August 6, 1882, at Boston, was duly licensed to sell spirituous and intoxicating liquors in a certain building on Carver Street in said city, which was then and there used by him for the sale of such liquors under the provisions of his license; and that he then and there placed and maintained on said premises, so used by him, "a certain screen, blind, shutter, curtain and partition, in such a way as to interfere with a view of the business conducted upon said premises, and with a view of the interior of said premises." Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the defendant was licensed as a first-class victualler, to carry on that business at the place in question; that the defendant's shop fronted on Carver Street, in Boston; that on that street it had two windows and a door with glass lights; that there were windows and a door on other sides of the shop; that, on the morning of the day in question (Sunday) the witnesses for the government saw shutters at the windows and door on Carver Street, but the size and obstruction of the shutters were in controversy. The defendant's evidence tended to show that he used these shutters solely for the purpose of protecting nis glass in the door and windows, and that he put them up only on closing his shop for the night; that on the night preceding the day in question he put them up for that purpose; that on the Sunday morning in question he was sick, and did not get up till afternoon, and was unable to get up; that his wife was the only other person in the

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house at the time; and that as soon as he did get up he took down the shutters. None of this evidence for the defendant was contradicted or denied. The government offered no evidence that any business was being done on that day, and the defendant testified positively that there was no sale made at his shop on that day; but there was evidence that the defendant carried on business upon other days than Sunday in said place, under the provisions of his license.

The defendant asked the judge to rule, among other things, as follows: "2. In order to convict the defendant, the government must prove that the closing of the shutters prevented or interfered with a view, that is, prevented one, by reasonably approaching the shop, from seeing the business carried on in the licensed premises. 3. If the defendant was not, in fact, doing business at the time alleged, and the shutters were put up simply for the purpose of protecting his property and closing his shop for Sunday, then he cannot be convicted, provided there were reasonable means left open for obtaining a view of the interior of the premises in which he was licensed to do business."

The judge declined to give the instructions requested, and instructed the jury that the government must prove beyond a reasonable doubt that the premises of the defendant were being used for the sale of intoxicating liquors, at the time covered by the complaint, under a license therefor; that it was not necessary that the government should show that there was any sale of liquors or any business carried on in said premises on the particular day on which it was alleged the offence was committed; and that it was not necessary for the government to prove that the shutters actually prevented a view; but if they substantially interfered with a view, then such evidence would authorize a conviction.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. R. Swasey, for the defendant.

G. Marston, Attorney General, (*C. H. Barrows*, Assistant Attorney General, with him,) for the Commonwealth.

COLBURN, J. The first request for instructions in this case was waived at the argument, instructions were given substantially

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in accordance with the second request, leaving only the third request for instructions for our consideration. The case distinctly presents the question, whether a person holding a license to sell intoxicating liquors is, on Sunday, when he is prohibited from doing business and when he is not doing business, subject to the provisions of the Pub. Sts. *c.* 100, § 12, as amended by the St. of 1882, *c.* 259, § 1, to the same extent as on secular days, when he is carrying on business.

We are of opinion that the statute, as amended, makes no distinction in times, but applies to the whole time for which the license is granted, or until the business is permanently abandoned.

Before the amendment, it might have been argued, with some force, that the words, "interfere with a view of the business conducted upon the premises," limited the application of the statute to times when business was actually carried on; but the addition of the words, "or with a view of the interior of said premises," precludes that construction.

It was doubtless one purpose of the Legislature to enable the officers having in charge the enforcement of the laws to ascertain readily whether the licensee was complying with the conditions of his license, as to the times he was forbidden to sell, as well as in other respects. And if it was one of the purposes of the Legislature to require that the business of selling intoxicating liquors, under license, should be carried on subject to public inspection, it is important that the public should be able to see without obstruction, not only how the business is carried on, but when it is carried on. *Exceptions overruled.*

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COMMONWEALTH *vs.* PATRICK GIBBONS.

Suffolk. January 12. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

A complaint on the Pub. Sts. c. 100, § 12, as amended by the St. of 1882, c. 259, § 1, alleged that the defendant, at a time and place named, was duly licensed to sell spirituous and intoxicating liquor in certain premises, to wit, "the room in the first story of the building situate and numbered fourteen in Charter Street in said city," and then and there used by him for the sale of spirituous and intoxicating liquor under the provisions of such license, and that he "did then and there place and maintain upon said premises, so used as aforesaid, a certain screen, blind, shutter, curtain and partition, in such a way as to interfere with a view of the business conducted upon said premises, and with a view of the interior of said premises." *Held*, that the complaint was sufficient.

COMPLAINT to the Municipal Court of Boston, on the Pub. Sts. *c.* 100, § 12, as amended by the St. of 1882, *c.* 259, § 1, alleging that the defendant, on August 6, 1882, at Boston, was duly licensed to sell spirituous and intoxicating liquor in certain premises, to wit: "the room in the first story of the building situate and numbered fourteen in Charter Street in said city," and then and there used by him for the sale of spirituous and intoxicating liquor under the provisions of such license; and that he "did then and there place and maintain upon said premises, so used as aforesaid, a certain screen, blind, shutter, curtain and partition, in such a way as to interfere with a view of the business conducted upon said premises, and with a view of the interior of said premises."

In the Superior Court, the defendant moved to dismiss the complaint, for the following reasons: "1. Said complaint is void for uncertainty, for that it does not appear by said complaint what premises the defendant used to sell spirituous and intoxicating liquors at the time of the commission of the offence alleged, and under the license alleged to be granted him; and also, that it does not appear by said complaint, with sufficient certainty, upon what premises the screen, blind, shutter, curtain and partition was placed and maintained in such a way as to interfere with a view of the business conducted thereon. 2. Said complaint is void for duplicity, in that it alleges that a certain screen, blind, shutter, curtain and partition was placed and maintained upon the premises described in said complaint,

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in such a way as to interfere with a view of the interior of said premises, and of the business conducted upon said premises, and does not allege what obstruction interfered with said view. 3. There is no offence fully, formally and substantially set forth in said complaint."

Mason, J. overruled the motion. The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. F. Donnelly, for the defendant.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

By the Court. The complaint is sufficient. It is not bad for duplicity, and it describes the premises occupied by the defendant with sufficient certainty. *Exceptions overruled.*

Commonwealth *vs.* Bartholomew O'Brien.

Suffolk. January 12. — 15, 1883. Field & W. Allen, JJ., absent.

A complaint for selling intoxicating liquors to a minor, without having "any license, authority, or appointment, according to law, to make such sale to said minor," need not allege that the defendant was licensed under the Pub. Sts. c. 100.

At the trial of a complaint for selling intoxicating liquors to a minor, a witness, who testifies to the fact of the sale and the general appearance of the person to whom the sale was made, may give his opinion as to the age of such person.

Complaint to the Municipal Court of Boston, alleging that the defendant, on August 2, 1882, at Boston, "unlawfully did sell intoxicating liquors to a minor, to wit, to a girl, whose name is unknown to said complainant; the said girl being then and there under twenty-one years of age, and the said O'Brien not having then and there any license, authority, or appointment, according to law, to make such sale to said minor."

In the Superior Court, the defendant moved to dismiss the complaint, for the following reasons: "1. It does not appear in or by the complaint that the defendant was licensed to keep for sale or sell spirituous or intoxicating liquors under chapter 100 of the Public Statutes of this Commonwealth. 2. There is no offence fully, formally and substantially set forth in said

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complaint." *Mason*, J. overruled the motion, and the defendant excepted.

At the trial, it appeared in evidence that, on the day of the alleged sale, a female of youthful appearance and in stature about as high as an ordinary man's shoulder, clad in a hat, shawl and short dress reaching to the knee, entered the place of business of the defendant, and purchased from him some ale, for which she paid, and which she carried away in a pail under her shawl.

The complainant, a witness called by the government, was asked by the government, after testifying as above to the appearance of the female, "What in your opinion was the age of this girl?" The defendant objected, but the judge overruled the objection, and the witness answered, "Not over thirteen years of age." This was all the evidence on the question whether said female was or was not a minor.

The defendant asked the judge to instruct the jury that the government was bound to prove, beyond a reasonable doubt, that the person to whom this sale was alleged to have been made was at the time a minor, and under the age of twenty-one years.

The judge instructed the jury as requested; and further instructed them that the evidence of the complainant as to his opinion of the age was evidence competent for them to consider and weigh on this point. To this ruling the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. F. Paige, for the defendant.

C. H. Barrows, Assistant Attorney General, (*G. Marston*, Attorney General, with him,) for the Commonwealth.

DEVENS, J. By the Pub. Sts. *c.* 100, § 1, every person is forbidden to sell intoxicating liquor except as he may be entitled so to do by virtue of that chapter, other sections of which provide for the granting of licenses by the authorities there named, upon the terms and conditions therein stated. No license can be granted which will permit a sale to a minor, and whether the defendant was or was not a licensee, such a sale by him would be a violation of the statute.

The Pub. Sts. *c.* 100, § 25, reënacting the St. of 1875, *c.* 99, § 15, provide for the recovery of a penalty for the sale of intoxicating

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liquor to a minor, by his parent or guardian, in an action of tort. It has been held that, in an action for such penalty, it is not necessary for the plaintiff to allege that the defendant was licensed under the statute; and that, such allegation having been made and the proof having failed to sustain it, it might be treated as surplusage. *McNeil* v. *Collinson*, 128 Mass. 313.

It is true that, if the defendant were convicted, upon complaint or indictment, of such a sale, there being an allegation, which was proved, that he was then a licensee, he would be exposed to the additional penalty of a forfeiture of his license and a disqualification to enjoy one for a year thereafter. Pub. Sts. *c.* 100, § 18. But if the proof had failed to sustain the allegation, and it had been negatived by the jury, as the sale of liquor to a minor, whether made by a licensed or unlicensed person, is unlawful, a verdict upon the rest of the indictment would have found the defendant guilty of an offence against the statute well described therein, although he might not be subjected thereby to the additional penalty which is imposed upon a licensee. The complaint in the present case was therefore sufficient, and the motion to dismiss it was properly disallowed.

After carefully describing the appearance, dress and manner of the girl to whom the sale was testified by him to have been made, and who was alleged by the complaint to have been a minor, the witness who thus testified was permitted to give his opinion as to her age. This inquiry came fully within the exception to the general rule that witnesses cannot give opinions, by which they have been permitted to express opinions on questions of identity as applied to persons, things or handwriting, and to give their judgment as to the size, weight or color of objects, or their estimate of time or distance. As there is much that cannot be reproduced or made palpable to a jury, the witness is in such matters, in the words of Mr. Justice Endicott in *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 133, permitted to give the "conclusion of fact to which his judgment, observation and common knowledge has led him in regard to a subject matter which requires no special learning or experiment, but which is within the knowledge of men in general."

Exceptions overruled.

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COMMONWEALTH *vs.* LILLY ISMAHL.

Suffolk. January 12. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

A count for maintaining a house of ill-fame, under the Pub. Sts. *c.* 101, §§ 6, 7, and a count for maintaining a disorderly house at common law, may be joined in one indictment; and it is not necessary to aver that the different counts are different descriptions of the same act.

At the trial of an indictment containing two counts, one, under the Pub. Sts. *c.* 101, §§ 6, 7, for maintaining a house of ill-fame, and the other, at common law, for maintaining a disorderly house, both of which relate to the same house and time, and the same acts done in said house, the defendant is not entitled to require the government to elect on which count it will go to the jury, although the evidence discloses but one series of facts or transactions.

INDICTMENT in two counts: the first count charged the defendant, under the Pub. Sts. *c.* 101, §§ 6, 7, with keeping and maintaining a certain common nuisance, to wit, a tenement used as a house of ill-fame; and the second count, at common law, charged her with maintaining a disorderly house, during the same times charged in the first count.

In the Superior Court, before the jury was empanelled, the defendant moved to quash the indictment for the following reasons, among others: "1. The matter set forth in said indictment is not sufficient in law, for that the indictment purports to be a presentment in two counts, whereas but one offence is set forth in what purports to be two counts. In the first count, so called, the offence charged is that of a common nuisance, and in the second count, so called, the defendant is charged with the same common nuisance at one and the same time. 2. Said indictment is void, for the reason that the indictment describes different offences dependent upon the same facts or transactions, without an averment that the different counts therein are different descriptions of the same acts." *Staples*, J. overruled the motion.

At the trial, the defendant, after the evidence was closed, asked the judge to rule that the government must elect on which of the two counts it would go to the jury, for the reason that the evidence showed but one state of facts or transactions, and both counts were dependent upon the same facts, and had relation to the same house and time, and the same acts done in said house. The judge declined so to rule, but ruled that the jury could only

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convict the defendant on one of the counts, and that the whole evidence was before the jury, and they might apply the same to either of the counts to which they might find it applicable; and if they found either count proved by the evidence beyond a reasonable doubt, they might convict on such count, and in that case they must acquit her on the other.

The jury returned a verdict of guilty on the first count, and a verdict of not guilty on the second count; and the defendant alleged exceptions.

G. E. Filkins & J. P. J. Ward, for the defendant.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

DEVENS, J. The exceptions taken by the defendant are well settled by decisions, the authority of which we have no disposition to question.

There was no misjoinder of counts; as the offences charged therein were of the same nature, they might properly be included in one indictment. *Commonwealth* v. *Kimball*, 7 Gray, 328. *Commonwealth* v. *Davenport*, 2 Allen, 299.

Nor was it necessary to aver that the different counts were different descriptions of the same act. The St. of 1861, *c.* 181, (Pub. Sts. *c.* 213, § 18,) was not intended to impose new restrictions upon the criminal pleader, but to enable him to join several counts describing different offences which could not be joined at common law. *Commonwealth* v. *O'Connell*, 12 Allen, 451. *Commonwealth* v. *Adams*, 127 Mass. 15.

Even if the evidence disclosed but one series of facts or transactions, and both counts had relation to the same house and time, and the same acts done in said house, the defendant could not of right demand that the prosecuting officer should elect on which of the two counts he would go to the jury. Even if the presiding judge might properly in some cases confine the public prosecutor to a single count, it is a matter within his discretion, and the exercise of it cannot be here reviewed. *Commonwealth* v. *Slate*, 11 Gray, 60. If evidence had been admitted upon one count which legally could not be applied to the other, attention should have been called to it by a request for an instruction to that effect. Every right of the defendant was preserved when the jury, having applied the evidence to one count,

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and having found that it justified them in convicting the defendant thereon, were directed to treat it as having exhausted its force, and to return a verdict of not guilty upon the other *Commonwealth* v. *Edds*, 14 Gray, 406. *Exceptions overruled.*

COMMONWEALTH *vs.* REBECCA COLLIER.

Suffolk. January 12. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquors, the evidence for the government tended to show a sale by the defendant of lager beer. The defendant testified that, at the time of the alleged sale, he had no intoxicating liquors on his premises; that the only beer he had was Bavarian hop beer; and that he bought all of his beer of a certain brewer; and he produced and identified a label as the label which was on the barrel from which the alleged lager beer was drawn. He then offered the label in evidence for the purpose of identifying the barrel and its contents; but it was excluded. *Held*, that it should have been admitted.

At the trial of a complaint for an unlawful sale of intoxicating liquors, a witness testified for the government that he tasted liquor sold by the defendant; that it was lager beer; and that he could tell by the taste alone whether it contained three per cent of alcohol. *Held*, that the defendant was not entitled to ask a witness, an expert in the manufacture and taste of beer, whether a person could determine from the taste alone the proportion of alcohol contained in a given sample of beer.

At the trial of a complaint for an unlawful sale of intoxicating liquors, it appeared that the defendant's saloon was fitted up with a bar, beer-pump, glasses and bottles; that on the exterior wall was the sign, "Ale and Lager Beer;" that, at the time of the alleged sale, the defendant had no license to sell intoxicating liquors, but that he had previously had a license. He testified that the interior arrangements of the saloon and the sign on the exterior were the same on the day of the alleged sale as they were when he had his license. He then asked the judge to instruct the jury, that, if they believed that the interior arrangement of the saloon, and the sign on the exterior, were in the same condition and position on the day of the alleged sale as they were in during the time he had his license, "no inference adverse to the defendant can be drawn therefrom." The judge declined to give this instruction. *Held*, that the defendant had no ground of exception.

COMPLAINT to the Municipal Court of Boston, charging the defendant, on July 20, 1882, at Boston, with an unlawful sale of intoxicating liquors. Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

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It appeared in evidence that the defendant kept a restaurant and saloon on Motte Street, in Boston; that said saloon was fitted up with a bar, beer-pump, glasses and bottles; that on the exterior wall was the sign, "Ale and Lager Beer;" that, at the time of the alleged sale, the defendant had no license to sell malt, spirituous or intoxicating liquors, but that she had previously had a license.

One Barker, a witness called by the government, testified that on July 20, 1882, he, in company with one Ellis, visited the place of business of the defendant, and while there heard an unknown man call for beer; that he saw the defendant draw from a beer-pump a liquid resembling lager beer and deliver it to the unknown man, who paid for the same; that the witness called for lager beer, and the defendant drew a glass of beer from the same pump and delivered it to the witness; that the witness tasted it, and that it was lager beer. On cross-examination, the witness testified that he determined that the beer delivered to him was lager beer by the taste and the color; that Bavarian hop beer was darker in color than lager beer; that, by the taste alone, he could tell whether any given sample of beer contained three per cent of alcohol, or more or less than three per cent of alcohol. Ellis corroborated Barker as to the sale of the beer and its appearance, but did not taste the same.

The defendant testified that she had previously had a license to sell intoxicating liquors for her said saloon; that the interior arrangements of the saloon and the sign on the exterior were the same on the 20th of July as they were when she had her license; that, at the time of the alleged sale, she had no spirituous or intoxicating liquor on or about her premises; that the only beer she had on draught, or otherwise, was Bavarian hop beer; and that she bought all of her beer of one Stanley, a brewer; and the defendant produced and identified a label as the label which was on the barrel from which said alleged lager beer was drawn. The label was offered in evidence for the purpose of identifying the barrel and its contents, but was excluded by the judge; and the defendant excepted.

Stanley testified that he was a brewer, and had been engaged in the business of brewing ale, lager beer and Bavarian hop beer for the ten years last past, and was familiar with the

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process of manufacture and the manufactured product; that he had sold the defendant Bavarian hop beer and no other beer; that Bavarian hop beer resembled lager beer in all respects except in the proportion of alcohol; that all Bavarian hop beer manufactured or sold by him contained less than three per cent of alcohol; that a particular label was put on every barrel of Bavarian hop beer that left his brewery or salesrooms; and that such label was placed on no beer containing three per cent or more of alcohol. The witness then identified a label as one of those placed on his Bavarian hop beer. The witness further testified that he was familiar with the manufacture and taste of Bavarian hop beer and lager beer, and the quantity and proportion of alcohol contained in each. The defendant then asked him whether any person could determine, from the taste alone, the proportion of alcohol contained in a given sample of beer, whether three per cent, or more or less. But the question was excluded by the judge; and the defendant excepted.

The defendant asked the judge to instruct the jury as follows: "If the jury believe that the interior arrangement of the saloon, and the exterior sign on the same, were, on the 20th of July last past, in the condition and position they were in during the time the defendant had a license to sell intoxicating or malt liquors, as testified to, no inference adverse to the defendant can be drawn therefrom." The judge declined so to rule, and did not instruct the jury specifically on this point.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. F. Paige, for the defendant.

C. H. Barrows, Assistant Attorney General, (*G. Marston*, Attorney General, with him,) for the Commonwealth.

C. ALLEN, J. 1. The principal fact in dispute was whether the beer which was drawn and sold was lager beer or Bavarian hop beer. This depended in part on whether it came from Stanley's. As bearing on this question, it was competent to prove that the barrel from which the beer was drawn had a label of Stanley's upon it. The witness in effect testified, "I know this beer came from Stanley's, because I had no other beer, and because Stanley's label was upon the barrel, and here is the label itself, which can be identified as his." The weight

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of this evidence, of course, was for the jury. But a witness who testifies to a principal fact may also give all circumstances relating to it which may tend to confirm his testimony. The label, therefore, should have been admitted. 1 Greenl. Ev. §§ 51–53.

2. Stanley's opinion whether any person could determine from the taste alone the proportion of alcohol in a given sample of beer was incompetent.

3. The refusal to give the requested instruction was right.

On the first point only, the entry must be,

Exceptions sustained.

COMMONWEALTH *vs.* JOSEPH P. WHELAN.

Suffolk. January 12. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquors, it appeared that the building in which the sale was made was bounded on one side by C. Street and on another side by S. Street, the two streets intersecting each other at the corner of the building; that the only entrance to the building and the only windows of the premises were on C. Street, the entrance being numbered "28 C. Street;" that a former entrance and a former window on S. Street had been permanently closed by boarding up, to meet the requirements of the authorities in granting a license to the defendant; that upon the wall of the building on S. Street there were two signs on which the defendant's name appeared, and upon the same wall a sign on which were the words, "Entrance 28 C. Street;" and that the whole building was within four hundred feet of a building on S. Street, then occupied by a public school. *Held*, that the defendant's building was on S. Street, within the meaning of the St. of 1882, c. 220.

At the trial of a complaint for an unlawful sale of intoxicating liquors, the government contended that the place in which the sale was made was within four hundred feet of a building on the same street, then occupied by a public school. The superintendent of public buildings testified that he had charge of said building, and had repaired the same under appropriations for public schools by the school board of the city; that he had seen schools in session there, but had no further personal knowledge that it was a public school. The superintendent of schools testified that said building was occupied by a certain primary school, and that it was under his charge as such superintendent; and that he had no personal knowledge of its establishment as a public school. The clerk of the school board produced a printed manual of all the public schools in the city, which he testified was issued by him under the direction of the school board; and produced from the records of said board the order for its preparation by him, and stated that this was the manual prepared under that order. The manual was then admitted in evidence, by which it appeared that said primary

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school was a public school, and located in said building. *Held*, that all the evidence was competent, and was sufficient to prove that the building was in fact occupied by a public school, within the St. of 1882, c. 220.

A license to sell intoxicating liquors, granted to a person whose premises are within four hundred feet of a building on the same street occupied by a public school, is void, under the St. of 1882, c. 220.

A complaint for an unlawful sale of intoxicating liquors is sustained by proof of an unlawful sale of lager beer, under the Pub. Sts. c. 100, § 27.

COMPLAINT to the Municipal Court of Boston, charging the defendant, on September 18, 1882, at Boston, with an unlawful sale of intoxicating liquors to a man whose name was unknown to the complainant. Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, in substance as follows:

The evidence showed that the defendant made a sale of lager beer to a man unknown, at the time alleged in the complaint, in a building bounded on one side by Chapman Street and on another side by Shawmut Avenue in Boston, the two streets intersecting each other at the corner of the building; that the only entrance to the building, and the only windows of the defendant's premises, were on Chapman Street, the entrance being numbered 28 Chapman Street; that a former entrance, and a former window, on Shawmut Avenue, had been permanently closed by boarding up; that upon the wall of the building on Shawmut Avenue there were two metallic signs on which were the words, "Whelan's Family Wine Store," and upon the same wall a paper sign on which were the words, "Entrance 28 Chapman Street;" that the bar on the defendant's premises was on the left-hand side of the entrance from Chapman Street, and in that portion farthest removed from Shawmut Avenue; and that the whole of said building was within four hundred feet of a building on Shawmut Avenue, which the government contended was then occupied by a public school.

To show that said building was so occupied by a public school, the government introduced the evidence of the superintendent of public buildings in Boston, who testified that he had been superintendent for eighteen years; that he had charge of said building, and had repaired the same under appropriations for public schools by the school board of said city; that he had seen schools in session there, but had no further personal knowledge that it was a public school. The superintendent of schools in

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Boston testified that said building was occupied by the Wait Primary School, and that it was under his charge as such superintendent; and that he had no personal knowledge of its establishment as a public school. The clerk of the school board of said city produced a printed manual of all the public schools in the city, which he testified was issued by him under the direction of the school board; and produced from the records of said board the order for its preparation by him, and stated that this was the manual prepared under that order. The manual was then offered in evidence, and admitted; to which admission the defendant excepted. It appeared by the manual that the Wait Primary School was a public school in Boston, and located in said building.

To all the foregoing testimony tending to show the character of said school, the defendant objected, contending that the only competent evidence that it was then a public school was a record of the city council of a vote establishing said school. It was admitted that there was no building on Chapman Street occupied by a public school.

The defendant held a license of the first class to sell liquors in his said premises at 28 Chapman Street, which was put in evidence.

The entrance and window of the defendant's premises on Shawmut Avenue were closed by the defendant prior to the issue of said license, to meet the requirements of the police commissioners of said city in relation to such license.

The defendant made several requests for rulings, which the judge declined to give; but instructed the jury that, upon the uncontroverted facts that the building occupied by the defendant was bounded on one side by Chapman Street and on another side by Shawmut Avenue, the two streets intersecting each other at the corner of said building, the only entrance to said building, and the only windows of the defendant's premises being on Chapman Street, and that a former entrance and a former window on Shawmut Avenue had been permanently closed by boarding up, that upon the wall of the building on Shawmut Avenue there were two metallic signs, on which were the words, "Whelan's Family Wine Store," and that upon the same wall there was a paper sign on which were the words, "Entrance

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28 Chapman Street," the building was on Shawmut Avenue, as well as on Chapman Street, within the meaning of the statute; that the government must prove beyond a reasonable doubt that the defendant made an illegal sale of intoxicating liquors; and that if the jury found that the building on Shawmut Avenue, which was admitted to be within four hundred feet of the defendant's premises, was occupied by a public school at the time the defendant's license was granted, then the license was void, and furnished no authority for the sale of intoxicating liquors on the defendant's premises; and, if any sale was made in said building, such sale was illegal.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. A. Alger, for the defendant.

G. Marston, Attorney General, (*C. H. Barrows*, Assistant Attorney General, with him,) for the Commonwealth.

COLBURN, J. The principal question presented in this case is, whether the building described in the exceptions and in the license was, under the facts in evidence, on Shawmut Avenue, within the meaning of the St. of 1882, *c.* 220. This building was situated at one of the corners of Shawmut Avenue and Chapman Street, bounding upon both streets, and having a door and window, or windows, upon each street, though during the time covered by the license the door and window on Shawmut Avenue were permanently closed by boarding. Before the door and window were boarded up, it could not be questioned that the building was situated on Shawmut Avenue, as well as on Chapman Street. It cannot with any propriety be held that, by boarding up the door and window upon one street, the situation of the building was so changed that it ceased to be on that street.

The fact that the door and window were boarded up to meet the requirements of the police commissioners in relation to the license, can have no effect in this case; the commissioners had no authority to determine, as against the Commonwealth, that the building was situated on one street, rather than on the other, or what facts should fix its situation, within the meaning of the statute. Indeed, it is not apparent that the defendant would have violated the condition of his license, requiring him "to

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close permanently all entrances to the licensed premises, other than those from the public street, or streets, upon which such premises are situated," if, as soon as he received his license, he had taken down the boarding and opened the door and window on Shawmut Avenue. The fact that the building is described as No. 28 Chapman Street did not change its situation; it might as properly have been described by its number on Shawmut Avenue. We do not intend now to decide that, in all cases which may arise, a building, some part of which is on a street upon which there is a public school, is on such street within the meaning of the statute; it is sufficient to decide that the building in this case was, within the meaning of the statute, on Shawmut Avenue.

The question is raised whether the evidence introduced was competent and sufficient to show that the building on Shawmut Avenue, which was proved to be within four hundred feet of all parts of the defendant's premises, was occupied in whole or in part by a public school.

We are of opinion that all the evidence offered upon this subject, including the printed manual prepared under the direction of the school board of the city, was competent, and that it was sufficient, if not conclusive, to prove that the building was in fact occupied by a public school, under the control of the school board of the city; and proof of a public school in fact was all that the statute required.

The defendant's building being on Shawmut Avenue, and a building on that street within four hundred feet of the defendant's building being occupied by a public school, the police commissioners were forbidden by the St. of 1882, *c.* 220, to grant to the defendant a license of the first class to sell intoxicating liquors in his building, and the license issued was void.

To sustain the complaint against the defendant, it was only necessary for the government to prove that he made a sale of lager beer to a man whose name was unknown to the complainant, lager beer being declared to be an intoxicating liquor. Pub. Sts. *c.* 100, § 27. The defendant, claiming to justify under a license, was required to prove it; Pub. Sts. *c.* 214, § 12; and this he did *prima facie* by the production of his license; but when it appeared, by the facts proved in the case, that no

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license could legally be granted for the sale of intoxicating liquor in the building described in his license, his justification failed, and his sale was illegal.

The rulings of the Superior Court were right.

Exceptions overruled.

COMMONWEALTH *vs.* BOSTON & LOWELL RAILROAD CORPORATION.

Middlesex. Nov. 27, 1882. — Jan. 3, 1883. HOLMES, J., absent.

It is no defence to an indictment against a railroad corporation, under the St. of 1874, c. 372, § 163, for causing the death of a passenger, that the passenger was not in the exercise of due care.

INDICTMENT on the St. of 1874, *c.* 372, § 163, for causing the death of Daniel Driscoll, on May 8, 1881, while a passenger on a train of cars of the defendant corporation. At the trial in the Superior Court, before *Brigham*, C. J., it appeared that Driscoll was a passenger on the defendant's road at the time named in the indictment, and, although there was room for him to stand within the cars, he was standing on the front platform of the first passenger car, when the train, through the negligence of an employee of the defendant, in misplacing a switch, left the main track, and ran into a train of cars standing on a side track; that Driscoll was crushed between the tender of the locomotive engine and the platform of the car on which he had been standing; and that no one else on the train of cars was injured.

These facts not being in dispute, the defendant asked the judge to rule that the indictment could not be maintained. The judge refused so to rule, and instructed the jury as follows: "It being admitted that carelessness or neglect of the defendant's agent or servant caused a collision of cars, upon which Driscoll was riding as a passenger, and that this collision caused the death of said Driscoll, the jury, for the purposes of this trial, are instructed, that no question of due care on the part of said Driscoll arises in this case, and that, — notwithstanding said Driscoll, at the time of said collision, was standing on

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the platform of the car upon which he was a passenger, having gone and remained there voluntarily, when there was room to stand within said car, — upon the undisputed facts, the jury will be warranted in finding that the allegations of the indictment are proved beyond a reasonable doubt, and in returning a verdict of guilty against the defendant." The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. George, for the defendant.

W. B. Gale & J. P. Gale, (*J. G. Maguire* with them,) for the Commonwealth.

COLBURN, J. The only question presented in this case is whether, at a trial under an indictment for causing the death of a passenger, based upon the provisions of the St. of 1874, *c.* 372, § 163, the want of due care on the part of the passenger killed is a defence to such indictment.

The first statute upon this subject was the St. of 1840, *c.* 80, which provided that, "if the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine, ... to be recovered by indictment, to the use of the executor or administrator of the deceased person," &c.

The St. of 1853, *c.* 414, subjected a railroad corporation to the same liabilities as the St. of 1840, *c.* 80, if from the same causes "the life of any person, not being a passenger or employee of such corporation, shall be lost, such person being in the exercise of due care and diligence," &c.

In the General Statutes the provisions of the St. of 1840, *c.* 80, are reënacted, and so far as they relate to railroad corporations are contained in *c.* 63, § 97, and the provisions of the St. of 1853, *c.* 414, are reënacted in *c.* 63, § 98. So far as the provisions of the St. of 1840, *c.* 80, relate to persons, or corporations other than railroads, they are reënacted in the Gen. Sts. *c.* 160, § 34, relating to offences against the person.

In the revision and consolidation, in 1874, of all general acts relating to railroads, the provisions of the Gen. Sts. *c.* 63,

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§§ 97, 98, are as follows: "If by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger is lost; or the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost; in either case, the corporation shall be punished," &c. St. 1874, *c.* 372, § 163.

In comparing these different statutes, we are led to the conclusion that the Legislature designed to subject the defendant to the penalty for causing the death of a passenger, though such passenger might have been wanting in the exercise of due care. We cannot suppose that, in all these statutes and revisions, the omission to require due care from a passenger, and the express requirement of it from other persons, is without meaning, and that due care is required alike in both cases.

The statute was designed, in part, to impose a punishment for the carelessness of the defendant, or its servants; and, as stated in the opinion in *Carey* v. *Berkshire Railroad*, 1 Cush. 475, the penalty "is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased." *Commonwealth* v. *Eastern Railroad*, 5 Gray, 473. *Commonwealth* v. *Boston & Albany Railroad*, 121 Mass. 36. That one purpose of the Legislature was to punish the defendant is further indicated by § 164, following the section upon which the indictment in this case is based, which provides that, under certain circumstances, a railroad company shall be subject to a fine, recoverable by indictment, as provided in § 163, for an injury to a person not a passenger, "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury."

If the person whose negligence caused the death had been indicted for manslaughter, the negligence of the deceased would not have been a defence. *Regina* v. *Longbottom*, 3 Cox C. C. 439. *Regina* v. *Swindall*, 2 Car. & K. 230.

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As we are governed in our construction of the statute in question by the comparative provisions of different statutes, it becomes unimportant to determine what construction the original statute of 1840, or its revisions, should receive, if the other statutes to which we have referred had not been passed, and little aid can be expected from the legislation or adjudications in other States or countries. Maine and New Hampshire are the only other States, so far as has come to our knowledge, in which the proceedings in similar cases are by indictment. The statute of Maine expressly requires that the deceased, though a passenger, should be in the exercise of due care. The statute of New Hampshire makes no distinction between passengers and other persons, not in the employment of the railroad company, and makes no allusion to the question of due care on the part of the person killed. The provisions for fine and its disposition are similar to those contained in our statute. The proceeding under this statute, though in the name of the State, is held to be substantially a civil proceeding to recover damages, and to be governed by the same rules, as far as practicable, as govern civil actions. *State* v. *Manchester & Lawrence Railroad*, 52 N. H. 528.

In England and in most of the States of the Union, a remedy in similar cases is given by statute to the personal representative of the deceased, to recover by civil action damages for the benefit of the widow, &c., and these statutes generally provide that the action may be maintained when the circumstances are such that the deceased, if he had survived, might have maintained an action for the injuries received.

Judgment on the verdict.

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COMMONWEALTH *vs.* PETER BARNACLE.

Middlesex. Nov. 27, 1882. — Jan. 9, 1883. DEVENS & HOLMES, JJ., absent.

At the trial of an indictment for manslaughter, in which the evidence shows that the deceased made an attack upon the defendant, on the issue whether the defendant acted in self-defence and under a reasonable apprehension of bodily harm, evidence is admissible in defence that the deceased was a larger and more powerful man than the defendant.

MORTON, C. J. This is an indictment for manslaughter, charging the defendant with the killing of one Thomas Barnacle, by stabbing him with a knife. The evidence tended to show that said Thomas attacked the defendant with a knife and fork. The defendant contended that he stabbed Thomas when this attack was made; and that he acted in self-defence, and under a reasonable apprehension that Thomas would do him great bodily harm. To prove this issue, he offered to show by a witness, who knew both Thomas and the defendant, that Thomas was a larger and more powerful man than the defendant. Upon the objection of the Commonwealth's attorney, the court rejected this evidence; and the defendant excepted.

It is well settled that, if a man is attacked, he has the right to defend himself. If the attack is of such a character, and made under such circumstances, as to create a reasonable apprehension of great bodily harm, and he acts under such apprehension, and in the reasonable belief that no other means will effectually prevent the harm, he has the right to kill the assailant. In such cases, therefore, the questions whether there was reasonable cause to apprehend great bodily harm, and whether the defendant acted under such apprehension, are material issues. *Commonwealth* v. *Woodward*, 102 Mass. 155. *Commonwealth* v. *O'Malley*, 131 Mass. 423. It necessarily follows, that, in the case before us, the question whether the defendant acted under a reasonable apprehension of great bodily harm to himself from the attack of Thomas, was a material issue. Any evidence which tends to prove this issue is competent. The jury could not intelligently pass upon this issue without being informed as to the character and circumstances of the attack. It seems to us clear, that the fact that the assailant was a larger and more

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powerful man than the defendant has a bearing upon the issue. The test is whether the fact is, according to the general experience of mankind, capable of affording a reasonable presumption or inference as to the issue in dispute. The question whether a man has reason to apprehend danger from an attack must depend in some measure upon the size and strength of the assailant. If the assailant is a child, or a weak and effeminate man, much inferior in strength to the party assaulted, and unarmed, common experience teaches us that there is no cause to apprehend serious danger from the assault. On the other hand, if the assailant is a large and powerful man, whom the assaulted party could not successfully resist by his unaided strength, this fact would naturally create in his mind an apprehension of danger, which might justify him in using a deadly weapon for self-defence. Certainly it must be competent to show that the assailant was armed with a deadly weapon; for the same reason, it may be shown that he is armed by nature with a superior size and strength, which makes his attack irresistible and dangerous.

We are of opinion that the fact which the defendant offered to prove, that the said Thomas was a larger and more powerful man than the defendant, was competent, and should have been admitted.

The Commonwealth relies upon the cases of *Commonwealth* v. *Hilliard*, 2 Gray, 294; *Commonwealth* v. *Mead*, 12 Gray, 167; and *Commonwealth* v. *York*, 7 Law Reporter, 497, 507. In *Commonwealth* v. *Hilliard*, the question we have discussed does not appear to have been raised. The defendant there offered to show the general character of the deceased as a fighting, brutal man, of great strength; and the decision was that the evidence was too remote, the court saying that "the provocation under which the defendant acted must be judged of by the *res gestæ;* and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant." It does not decide that the defendant could not put in, as part of the *res gestæ*, the fact that the deceased was larger and more powerful than himself.

So in *Commonwealth* v. *York*, the defence being that the homicide was committed under provocation and in mutual

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combat, it was ruled at the trial that upon these issues evidence of the general character of the deceased as a quarrelsome man and as a prize-fighter was not admissible. The question before us was not raised or considered.

In *Commonwealth* v. *Mead*, the court held that evidence tending to prove the great muscular strength of the deceased was incompetent. That case has not, we think, been followed by other courts, and has been much questioned by the profession. So far as it conflicts with our decision in the case before us, we feel constrained to overrule it.

Exceptions sustained.

W. B. Gale & J. P. Gale, for the defendant, in addition to the cases mentioned in the opinion, cited *Selfridge's case*, 33, 56, 60, 64, 66, 164; *Hurd* v. *People*, 25 Mich. 405; *Dukes* v. *State*, 11 Ind. 557; *State* v. *Keene*, 50 Mo. 357; *State* v. *Bryant*, 55 Mo. 75; *State* v. *Harris*, 59 Mo. 550; *State* v. *Benham*, 23 Iowa, 154; *State* v. *Collins*, 32 Iowa, 36; *People* v. *Lamb*, 2 Keyes, 360, 364; *Commonwealth* v. *Drum*, 58 Penn. St. 9; *State* v. *Tackett*, 1 Hawks, 210; *State* v. *Hogue*, 6 Jones (N. C.) 381; *State* v. *Smith*, 12 Rich. 430; *Fields* v. *State*, 47 Ala. 603; *Rippy* v. *State*, 2 Head, 217; *Wesley* v. *State*, 37 Miss. 327.

G. Marston, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* ELIZABETH S. FENNO.

Middlesex. January 12. — 23, 1883. FIELD & W. ALLEN, JJ., absent.

On an indictment for unlawfully using an instrument upon a woman, with intent to procure a miscarriage, the defendant's bill of exceptions stated that, in the course of the trial, there was evidence that the woman went to the house of the defendant, remained there half an hour, and then came out and met a man, who had accompanied her to the house, and that this was the time when the government contended the operation was performed; that the government, against the objection of the defendant, was further permitted to prove, as tending to show that such an operation was performed, that the woman, when she met the man, said to him, "Oh dear, I feel weak!" and that the judge ruled that all exclamations made by the woman, indicating present pain, were admissible for that purpose. *Held*, that the defendant had no ground of exception.

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INDICTMENT, under the Gen. Sts. *c.* 165, § 9, for unlawfully using an instrument upon Margaret Coughlin, on September 26, 1881, with intent to procure a miscarriage, and thereby causing the death of said Coughlin. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

In the course of the trial, evidence was introduced tending to show that, on September 21, 1881, Coughlin went to the house of the defendant, remained there half an hour, and then came out of the house, crossed the street and there met one Stoddard, who had accompanied her to the street on which said house was situated, and near it. The government contended that an operation to procure a miscarriage, as charged in the indictment, was performed on Coughlin, by the defendant, while in the house. As tending to show that such an operation had been performed, the judge, against the objection of the defendant, allowed Stoddard to testify, in answer to a question by the government, that Coughlin, when she so met Stoddard, said to him, "Oh dear, I feel weak!" and ruled that all exclamations made by Coughlin indicating present pain were competent for the purpose for which they were offered as aforesaid.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. B. Gale & J. P. Gale, for the defendant.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

HOLMES, J. There is no doubt that the exclamation was properly admitted to prove the fact of Coughlin's weakness at the time it was uttered, if any evidence of the weakness was admissible for the purpose disclosed by the bill of exceptions. *Bacon* v. *Charlton*, 7 Cush. 581. *Insurance Co.* v. *Mosley*, 8 Wall. 397, 405. There is equally little doubt that, for some purposes, the fact of Coughlin's weakness at a certain time might have been relevant. For instance, if it was otherwise established that the operation was performed upon Coughlin, and that she died of it, as alleged in the indictment, — that she entered the defendant's house strong and well and on the same day fell into her mortal illness, — proof that she left the house weak would obviously tend to fix the time of the operation. And we think

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that the evidence has some tendency to show that the operation was performed.

The court have felt some difficulty with the construction of the bill of exceptions, but they do not understand it to state or warrant the inference that this was the only evidence put in. The question which is presented is simply whether this evidence was relevant to the issue, in connection with any other evidence that might have been offered. Without assuming that weakness and such an exclamation concerning it on the part of a woman, under the circumstances disclosed, were more likely to be due to bodily disturbances of a certain nature rather than of any other, or that a jury might have so found, yet with proof that Coughlin was *enceinte*, and that the defendant gave it to be understood that she relieved such cases, the evidence excepted to would have had an undeniable tendency to prove the operation. Again, it does not appear at what stage, or under what circumstances, the testimony was admitted. Suppose that the defendant had introduced evidence that Coughlin was in perfect health during the time in question. If believed, it would have gone far to prove that the crime had not been committed. Then evidence to the contrary must be one step towards supporting the indictment. We do not say that it goes far enough by itself, or that, if it stood alone, it would not be the duty of the court to instruct the jury that there was no sufficient evidence of the fact to be proved; but that is not the question which this bill of exceptions presents. See *Higgins* v. *Andrews*, 121 Mass. 293. *Exceptions overruled.*

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COMMONWEALTH *vs.* JOHN MAHONEY.

Norfolk. January 12.—15, 1883. FIELD & W. ALLEN, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquor, the identity of the offence is not to be determined solely by the date named in the complaint or that given in evidence; but if the sale testified to in the appellate court is the same as that testified to in the lower court, it is immaterial that the witness, in fixing the date in the lower court, named one which does not correspond with that given in his testimony in the appellate court.

COMPLAINT to the District Court of East Norfolk, charging the defendant, on July 5, 1882, at Randolph, with an unlawful sale of intoxicating liquor to Richard Uniac. Trial in the Superior Court, before *Colburn*, J., who allowed a bill of exceptions, in substance as follows:

The only witness for the government was Uniac, who testified that, on July 10, 1882, he purchased a quantity of intoxicating liquor of the defendant; that he was the only witness on the trial of the complaint in the District Court; that he testified in that court that the sale was made on July 6, 1882; that there was no evidence there of any sale upon any day other than July 6; that he made a mistake in his testimony in the District Court; that the sale actually took place on July 10, and not on July 6; and that he testified to one and the same transaction at both trials.

The defendant asked the judge to rule that, if there was no evidence before the District Court of a sale other than of one upon July 6, and if the only evidence at the present trial related to a sale upon July 10, then the offence here testified to was not the offence of which the defendant was convicted in the District Court, and the jury should return a verdict of not guilty; and that, if the jury should find that the sale was made on July 10, they should return a verdict of not guilty.

The judge refused so to rule; and instructed the jury that, if the transaction here testified to was the same transaction testified to in the District Court, it made no difference as to the identity of the offence that the witness fixed the date in the District Court as July 6, and now fixes it as July 10.

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The jury returned a verdict of guilty; and the defendant alleged exceptions.

O. A. Galvin & J. W. O'Brien, for the defendant, cited *Commonwealth* v. *Crawford*, 9 Gray, 129, 131.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. A defendant cannot be legally convicted in an appellate court of a different offence from that of which he was convicted in the court appealed from. He can only be tried for the same offence. But the identity of the offence is not to be determined solely by the date given in the complaint or testified to by the witnesses. Time is often, as in the case at bar, not a material element of the offence, and need not be proved as alleged. The identity may be determined by other facts and circumstances. In the case at bar, the jury have found that the sale of liquor testified to in the Superior Court was the same sale which the witness testified to in the court appealed from. The mistake of the witness in fixing the day of the sale, in his testimony in the lower court, is immaterial. The defendant has been convicted in the Superior Court of the same offence of which he was convicted in the court below, and has no ground of complaint. *Commonwealth* v. *Dillane*, 11 Gray, 67. *Commonwealth* v. *Baldwin*, 129 Mass. 481.

Exceptions overruled.

COMMONWEALTH *vs.* EMORY W. SHAW.

Norfolk. January 12. — 15, 1883. FIELD & W. ALLEN, JJ., absent.

It is no defence to an indictment for an assault upon a child with intent to carnally know and abuse her, that the defendant, in making the assault, threw the child into such a position that it was impossible for him to accomplish his purpose of ravishing her.

INDICTMENT for an assault upon a female child under the age of ten years, with intent to carnally know and abuse her.

At the trial in the Superior Court, before *Aldrich*, J., the evidence introduced by the government tended to prove that

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the child assaulted was thrown down upon her hands and knees on the floor; that the defendant, while the child was in that position, attempted to have carnal knowledge of her body; and that her private parts were then and there lacerated by the defendant, and blood caused to flow therefrom.

The defendant introduced evidence tending to prove that it was physically impossible for him to have had carnal knowledge of the child in the position described; and asked the judge to rule that, "if from the position of the child it was physically impossible for the defendant to ravish her, he cannot be convicted of an assault with intent to carnally know and abuse her." The judge declined so to rule; but ruled that, if the defendant assaulted the child with intent carnally to know and ravish her, the jury would be authorized to convict him, although he might have found it, in making the attempt, physically impossible to consummate his intent by actual sexual intercourse with the body of the child in the position before described.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

By the Court. The defendant, having assaulted the child with the intent to carnally know and abuse her, was properly convicted, although in his assault he threw her into such a position that it was impossible for him to accomplish his purpose of ravishing her. The fact that he failed in his attempt is no defence. The instructions were right.

Exceptions overruled.

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COMMONWEALTH *vs.* EDWARD RYAN.

Worcester. Nov. 27, 1882. — Feb. 28, 1883. DEVENS & HOLMES, JJ., absent.

At the trial of an indictment for the murder of a woman by poison, there was evidence that the life of licentiousness and debauchery which she had led would account for her death and the symptoms attending her last sickness; and that her reputation for sobriety was not good. The defendant then offered to show particular occasions when the woman had been seen drunk. This evidence was excluded. *Held*, that, as it did not appear that the particular acts of drunkenness were connected with the death of the woman, or were near the time of her death, the defendant had no ground of exception.

The magistrate presiding at an inquest, under the Pub. Sts. c. 26, is only required, by § 15, to file his report with the records of the Superior Court; and if he files, with the report, his minutes of the testimony taken at the inquest, one indicted for killing the person on whose body the inquest is held is not entitled to put in evidence the fact that the testimony was so filed, and that it was afterwards suppressed by the government.

MORTON, C. J. This indictment charges the defendant with the murder of his wife, Mary J. Ryan, by administering arsenic to her. At the trial, the defendant contended, and offered to show, that the life of licentiousness and debauchery led by Mrs. Ryan would account for her death and the symptoms attending her last sickness. For this purpose, he introduced evidence, by a number of witnesses, "that her habits of, and reputation for, sobriety were not good."

He offered to show by one of the witnesses, who had testified as to her character as a drunkard, particular occasions when he had seen her drunk. The court excluded the evidence, and the defendant excepted.

Evidence that she was an habitual drunkard would be competent, if supplemented by evidence that the effects and symptoms produced by habitual drunkenness would or might be similar to those found to exist by an examination of the deceased woman. Evidence of particular acts of drunkenness, not occurring at or near the time of her death, not connected with it, but remote in time, has no tendency to prove any of the issues in the case, except so far as it might tend to show that she was an habitual drunkard. It is not stated or contended that the particular acts of drunkenness to which the witness would testify were connected with the death, or were near the time of her death.

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The question presented to us is whether, in order to prove that the woman's character was that of an habitual drunkard, the defendant had the right to go into any number of individual instances of intoxication throughout her life, unrestrained by the discretion of the court. We do not understand that the law gives him such a right.

A similar question arose in *Commonwealth* v. *Abbott*, 130 Mass. 472. There the defendant, being on trial for the murder of Maria L. Crue in 1880, contended that the homicide was committed by her husband; and, in order to show that at the time of the homicide they were living in unfriendly and hostile relations, offered to show threats and acts of unkindness by the husband towards the wife in 1874 and in 1877. The presiding justices excluded the evidence; and the full court held that it was within their discretion to determine whether the evidence offered was so remote in time, or so insignificant in character, as to furnish no aid in deciding the fact to be found.

It is the common practice for the court, in its discretion, to limit the number of impeaching witnesses or of witnesses to good character. It must be in the power of the court to limit the amount of the testimony where it may be extended indefinitely, as in cases of usage, or character, or genuineness of handwriting. *Cushing* v. *Billings*, 2 Cush. 158. Confirmed habits of drunkenness can usually be easily proved without going into the investigation of particular instances, while such investigations, if unlimited, would tend to raise a multiplicity of collateral issues, and to distract and confuse the minds of the jury and to divert them from the real issues of the case.

In the case at bar, we are of opinion that it was within the discretion of the presiding justices to admit or reject the evidence offered of particular acts of drunkenness. They were required to exercise this discretion, in view of the other evidence and of the general aspect of the case before them. We have not the right to revise their exercise of this discretion, and the defendant has no right of exception to it. This exception, therefore, must be overruled.

We are also of opinion that the other exception relied upon by the defendant must be overruled. It appeared that the judge of the First District Court of Southern Worcester held

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an inquest upon the body of Mrs. Ryan; and that he returned his report, together with the minutes of the evidence taken by him, to the office of the clerk of the courts. The defendant offered to show that the minutes of testimony "had thereupon passed into the hands of the district attorney, and had been suppressed by him or by some other person, so that the defendant did not have access to them." The court rejected the evidence. The defendant contends that the rule of law in civil cases, that, if a party suppresses or destroys evidence, that fact may be proved as affording some presumption that the evidence, if produced, would be adverse to him, is applicable in this case.

If we assume, without deciding, that, if a prosecuting officer suppresses evidence in a criminal case, that fact may be proved, as in a civil case, yet this case is not within the rule. The justice who holds an inquest is required to draw up and sign a report, and file it with the records of the Superior Court. Pub. Sts. *c.* 26, § 15. He is not required to take or file minutes in writing of the testimony before him. Such minutes when taken are for his private use, and belong to him. They are not competent evidence for any purpose in the trial of an indictment for the murder of the person to whom the inquest relates. There was therefore no suppression of evidence. Undoubtedly the defendant might show by the testimony of the judge, if such was the fact, that the witnesses testified differently at the inquest and at the trial, but the minutes would not be admissible for this purpose. It is not legitimate to ask the jury to infer that the paper which is alleged to be suppressed would show a self-contradiction in the witnesses, and to act upon that inference when the paper itself, if produced, would not be competent evidence. It is proper to add, that we have considered this question as if there had been a direct offer to prove that the district attorney had suppressed this paper. The offer was to prove that it had been suppressed by "him or by some other person," which is less favorable to the defendant's claim.

Exceptions overruled.

F. A. Gaskill, for the defendant.

G. Marston, Attorney General, (*C. H. Barrows*, Assistant Attorney General, with him,) for the Commonwealth.

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COMMONWEALTH *vs.* WILLIAM J. MOSHER.

Dukes County. Oct. 24, 1882.—Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

Since, by the Pub. Sts. c. 155, § 7, no one but a justice of the peace can be a trial justice, and, by § 9, a justice of the peace duly appointed trial justice ceases to be such if his commission as justice of the peace expires before his commission as trial justice, a signature to the jurat annexed to a complaint, and to a warrant, as trial justice, involves a signature as justice of the peace, and no separate designation of the inferior office is necessary.

COMPLAINT "to Ichabod N. Luce, Esquire, a trial justice in and for the county of Dukes County," for keeping and maintaining a common nuisance, to wit, a certain tenement in Cottage City used for the illegal sale and illegal keeping for sale of intoxicating liquors, on June 15, 1882, and on divers other days and times between that day and July 23, 1882. The jurat annexed to the complaint and the warrant issued thereon were each signed by "Ichabod N. Luce, trial justice." The defendant was tried on the complaint, adjudged guilty, and sentenced by said magistrate; from this sentence he appealed to the Superior Court.

In that court, the defendant moved to quash the complaint, on the ground that it did not appear by the record that Ichabod N. Luce, who designated himself as trial justice, was a justice of the peace commissioned as a trial justice. This motion was overruled.

The jury returned a verdict of guilty; and the defendant appealed to this court.

J. Brown, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

FIELD, J. The jurisdiction of an inferior magistrate to issue warrants must clearly appear on the papers. *Commonwealth* v. *Fay*, 126 Mass. 235. No one but a justice of the peace can be a trial justice; Pub. Sts. *c.* 155, § 7; and a justice of the peace duly appointed trial justice ceases to be such if his commission as justice of the peace expires before his commission as trial justice. Pub. Sts. *c.* 155, § 9.

It follows that a signature as trial justice involves a signature as justice of the peace, and no separate designation of the

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inferior office is necessary. The signature as trial justice means that the signer is the legal holder of that office, that is, that he is a justice of the peace holding a commission as a trial justice.

The entry must be, *Judgment on the verdict.*

JOHN KENNEDY *vs.* LOUISA P. OWEN.

Franklin. Sept. 19, 1882. — Feb. 27, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

The remedy provided by the Gen. Sts. c. 25, § 4, for enforcing payment of an award of fence-viewers, is applicable only to a case where the duty of maintaining the fence is required by the statute, and does not apply to a case where such duty arises from the acceptance of a deed containing a condition to maintain it.

CONTRACT. The declaration alleged that the plaintiff, on July 31, 1880, was the owner in fee and occupant of a certain tract of improved land in Greenfield; that the defendant was the owner in fee and occupant of an adjoining tract of improved land; that both of these tracts of land were formerly one undivided lot, of which one Harding G. Woodard was seised in fee; that Woodard, on July 18, 1868, conveyed to one Jesse A. Coombs the defendant's land, by a deed duly recorded and containing the following condition: "that the said Coombs, his heirs and assigns, shall make and maintain all fences around the granted premises;" that afterwards Coombs, under and by virtue of said condition, made and erected a partition fence between the land so conveyed to him and the remaining part of said lot, which is the same as the plaintiff's land; that said fence was kept up and maintained by Coombs while he remained the owner of said land; that on September 7, 1868, Coombs conveyed said land in fee to the defendant, by deed duly recorded and containing the following condition: "that the said Owen is to make and maintain all the fences around the granted premises;" that Woodard, on February 7, 1870, by deed duly recorded, conveyed in fee the remaining part of said lot, separated by the said fence, to the plaintiff; that under and by virtue of said condition, the defendant, as owner

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of said land adjoining the land of the plaintiff, became bound by law to keep up and maintain the fence; that on July 31, 1880, said fence having become ruinous and out of repair, and the defendant, though often requested, having refused and neglected to repair or rebuild the same, the plaintiff complained to the fence viewers of Greenfield, of the refusal and neglect of the defendant; that the fence-viewers, after due notice to the defendant, surveyed the fence, determined that it was insufficient, signified the same in writing to the defendant, and directed her to repair or rebuild the fence within fifteen days from the date of their order; that the plaintiff afterwards rebuilt the fence, the defendant failing to comply with said order; that the fence-viewers, after due notice to the defendant, adjudged the fence sufficient and gave their certificate of the value thereof, together with their fees, the value being fixed at the sum of $55.62, and the costs of their proceedings at the sum of $9.08; that, more than one month before the date of the writ in this action, the plaintiff demanded of the defendant double the sum ascertained to be the value of the fence, and also double the amount of the fees and costs of the fence-viewers; that the defendant had for more than one month after said demand, and ever since, neglected and refused to comply therewith, and had never paid the same; that in all the above proceedings the provisions of the Gen. Sts. *c.* 25, §§ 3, 4, had been complied with; and that an action had thereby accrued to the plaintiff, and he was entitled to recover of the defendant the sums aforesaid, amounting in the whole to the sum of $129.40.

The defendant demurred to the declaration, on the ground that it set forth no legal cause of action. The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

C. G. Delano, for the plaintiff.

G. D. Williams, for the defendant.

C. ALLEN, J. The special remedy provided by statute for enforcing payment of an award of fence-viewers is applicable only to cases where the neglected duty of maintaining the fences was also required by the statutes. The remedy is by an action to recover double the amount of the award. It is therefore not to be extended beyond the spirit of the statute

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The language of § 3, that, "if a party refuses or neglects to repair or rebuild a partition fence which he ought to maintain," the aggrieved party may complain to the fence-viewers, means a partition fence which he ought to maintain by force of the provisions of this chapter. It was not designed to give this special remedy, with the infliction of double damages, for the omission to perform an ordinary voluntary contract, unless indeed such contract should be entered into and recorded according to the provisions of § 11. That section provides that, where a division of fence has been made, either by fence-viewers or under an agreement in writing between the parties recorded in the town clerk's office, the several owners, and their heirs and assigns, shall erect and support said fences according to such division; thus imposing upon them the statutory duty of performing their agreement, and, as may reasonably be considered, subjecting them to the statutory remedy in case of non-performance.

The case of an agreement not so recorded, or of an obligation arising from the acceptance of deeds, such as it is contended exists in the present case, is not included in the above or any other section of the statutes; and the statutes were not designed to furnish a new and cumulative remedy for enforcing a right which existed, if at all, under other agreements than those specified. We are to ascertain from a reading of the whole statute what the Legislature intended, and not merely to look at the literal construction of the words of a particular clause, taken by itself alone. Reading § 2 of the statute literally, it would require the plaintiff in the present case to maintain this partition fence with the defendant, in equal shares. But that section is not designed to override any agreement made between the parties. So, in like manner, § 3 is not to receive a construction which shall subject the defendant to an onerous liability for an omission to perform duties not imposed by the statute. Certain duties are declared, and certain remedies provided, in the same chapter. The natural and obvious meaning is, that the statutory remedies are designed for the breach of the statutory duties. See Bishop on Written Laws, § 193, note, and cases cited. *Judgment for the defendant affirmed.*

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WILLIAM G. WHITE *vs.* EDWARD W. CHAPIN & another.

Hampden. January 6. — February 27, 1883.

Upon the dissolution of a partnership existing between A. and B., all matters between them were settled with the following exceptions: after the death of B. a sum of money due to the partnership was held by a third person, and the proper distribution of this money was submitted by A. and the administrator of B. to an arbitrator, under whose award one half was paid to each party. Subsequently A. learned that B. received, during the continuance of the partnership, a sum of money on partnership business, which had not been entered on the books or accounted for by him, one half of which belonged to A. B.'s estate had been represented insolvent, a partial distribution to creditors was made under order of court, and the balance in the administrator's hands was less than the amount remaining due to creditors; and no debts were due to or from the firm. *Held*, that A. could not maintain a bill in equity against B.'s administrator and C., who held the sum so received and unaccounted for by B., to enforce payment of the share of said sum belonging to A.

C. ALLEN, J. This is a bill in equity, brought by the surviving partner of a firm of attorneys and counsellors at law, against the administratrix of the estate of his deceased partner, and another person alleged to be in possession of funds belonging to said estate, in which the plaintiff seeks to obtain a settlement of the partnership affairs, and to compel the payment of what will be found to be due to him on such settlement. By the bill, answers, and the report of a master to whom the cause was referred, the following facts appear: The partnership terminated on June 1, 1878; the deceased partner died on October 25, 1879; the administratrix was appointed on November 5, 1879; the deceased partner's estate was represented insolvent on April 6, 1880; a partial distribution to creditors was made, under order of the Probate Court passed in April 1881; the administratrix has in her hands a balance of $1068.11; and the balance remaining due to creditors is more than the amount of the funds on hand. No debts are due to or from the firm; and all matters between the partners were settled between themselves, with the following exceptions: After the death of the deceased partner, a certain sum of money, due to the partnership, was held by a third person, and the proper distribution of this money was submitted by the plaintiff and the administratrix to a reference, and an award was made, and the money was paid over, in part to the plaintiff, and in part to the administratrix, in pursuance

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of the award. The amount so paid to the administratrix was $950. After this was done, the parties believed that all matters of the firm were settled. Subsequently, however, in March 1881, the plaintiff learned that his deceased partner received, during the continuance of the partnership, a sum of money on partnership business, which had not been entered upon the books or accounted for by him; and the master found that this sum so unaccounted for was $695, one half of which belonged to the plaintiff. The plaintiff, indeed, contended that the amount so due to him was greater, and alleged exceptions to the master's report; but we think these exceptions must be overruled, and it is not material to dwell upon them further. Upon the master's report, the plaintiff is justly entitled to a balance of $347.50, with interest, as the amount due to him upon a settlement of the partnership; and the question remains, whether the bill can be maintained to enforce the payment of that sum to him out of the funds in the hands of the defendants, or whether he must be remitted to the Probate Court to make proof of his claim, and share *pari passu* with the general creditors of the deceased.

The plaintiff is not entitled to maintain this bill by reason of the money collected by the deceased partner in his lifetime. That money was not ear-marked, or distinguishable from the mass of his property, and in the hands of the administratrix is not subject to any trust or equitable lien. *Trecothick* v. *Austin*, 4 Mason, 16, 29. *Johnson* v. *Ames*, 11 Pick. 173, 181.

Any lien which the plaintiff might have had upon the funds in the hands of the third person, after the decease of his partner, was lost by the distribution and payment of it under the award. This was equivalent to a division of the funds by agreement. *Lingen* v. *Simpson*, 1 Sim. & Stu. 600. *Giddings* v. *Palmer*, 107 Mass. 269. 1 Lindley on Part. (4th ed.) 680, 683. The administratrix received the portion paid to her, not as partnership assets, and not on any trust, express or implied, but as the share to which the deceased was entitled; and, unless in case of fraud or mistake, which we do not here take into consideration at all, the plaintiff cannot follow the money specifically.

Bill dismissed.

W. G. White, pro se.

E. W. Chapin, for the defendants.

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WILLIAM G. WHITE *vs.* SPRINGFIELD INSTITUTION FOR SAVINGS.

Hampden. Jan. 18. — Feb. 28, 1883. FIELD & W. ALLEN, JJ., absent.

Whether a bank, having deposits standing in the names of two separate persons, which are spelled differently, but pronounced alike, in paying the amount due to one of these depositors, ought to have known or supposed that he was the person intended as the defendant in a trustee process served upon the bank, in which his name was spelled like that of the other depositor, is a question of fact, upon which the finding of the Superior Court is not open to revision in this court.

SCIRE FACIAS upon a judgment in a trustee process. At the trial in the Superior Court, before *Pitman*, J., without a jury, the plaintiff asked the judge to rule that the defendant should be charged. The judge refused so to rule, and found that the defendant was entitled to be discharged; and the plaintiff alleged exceptions. The facts appear in the opinion.

W. G. White, *pro se*.

H. Morris, for the defendant.

COLBURN, J. The question in this case is whether the defendant in this suit, summoned as trustee in the original action, when it afterwards paid the deposit standing in the name of James Shay, knew or ought to have known that this depositor was the same person who was the principal defendant in the original action, and named in the writ James Shea, the trustee having deposits belonging to different persons standing in each name.

The burden was upon the plaintiff to show affirmatively by the answers of the trustee, aided by other competent collateral evidence, that the trustee should be charged; and if he failed in this, the trustee should have been discharged. *Porter* v. *Stevens*, 9 Cush. 530. *Richards* v. *Stephenson*, 99 Mass. 311.

The treasurer was the proper person to answer for the trustee, and his answers and statements, sworn to, are to be considered as true, in deciding how far the trustee is chargeable. Pub. Sts. *c.* 183, §§ 16, 17. The answers and examination of the trustee in this suit have the same effect they would have had if made in the original suit. Pub. Sts. *c.* 183, § 53. *Fay* v. *Sears*, 111 Mass. 154.

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The question whether Shay and Shea are different names, or only different ways of spelling the same name, was one of fact, and not of law. *Commonwealth* v. *Gill*, 14 Gray, 400. *Commonwealth* v. *Mehan*, 11 Gray, 321.

The treasurer in his answers states that he had no knowledge or suspicion that James Shay, whose deposit he paid, was the defendant in the original suit; and this statement is to be taken as true, leaving the question whether he ought fairly, under all the facts, as disclosed in his answers, and the collateral evidence, to have known or supposed the identity, the only one to be determined.

This, we think, was a question of fact; and the presiding justice having found the fact in favor of the defendant, we do not see that any rule of law has been violated.

Exceptions overruled.

J. E. PORTER *vs.* GEORGE W. HUBBARD.

Worcester. Oct. 4, 1882. — Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

After an entry by a mortgagee of a farm to foreclose his mortgage, an arrangement was made between the mortgagee and mortgagor by which the latter was to carry on the farm. Subsequently, A., who had purchased the equity of redemption of the mortgagor, by deed duly recorded, took possession of the farm and carried it on, employing the mortgagor as his agent. A. then, after the crops were sown, borrowed money of the plaintiff, under a promise to pay it back from the first crops raised on the farm. The mortgagee, after this, was informed for the first time that A. was carrying on the farm, and of the agreement A. had made with the plaintiff, and he objected to A.'s paying the plaintiff from the crops. After the crops were gathered, they were allowed to remain in the possession of A., who delivered to the plaintiff a part of the crops to pay the debt due the plaintiff, and who informed the plaintiff, at the time of such delivery, of the mortgagee's claim. The mortgagee subsequently took possession of the crops, including that portion of them delivered to the plaintiff. *Held*, that, even if the arrangement between the mortgagee, after entry, and the mortgagor constituted the latter a tenant at will, there was no evidence that such a relation existed between the mortgagee and A.; and that an action of tort in the nature of trover would not lie against the mortgagee.

TORT for the conversion of four boxes of tobacco. Answer, a general denial. Trial in the Superior Court, without a jury,

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before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

In 1875, Moses C. Porter, who owned a farm, a part of which was used for raising tobacco, and a part for various other crops, mortgaged the tobacco land to Samuel H. Dickinson. On March 1, 1876, the equity of redemption of Moses was attached by Augusta A. Porter. On August 15, 1876, Dickinson made an entry for breach of the condition of his mortgage, and a certificate of entry was duly executed and recorded, which recited that such entry was "for breach of condition of the mortgage, and for the purpose of foreclosing the same, and of taking the rents and profits thereof." At the time of this entry, Moses was notified by the defendant, who acted as agent for Dickinson, and also as a subsequent mortgagee who had entered for breach of condition on the same day as Dickinson, that the crops would belong to the mortgagee, and that he, Moses, would be entitled to reasonable compensation for raising them. On November 11, 1876, the equity of redemption of Moses was sold on execution to Augusta, and a deed thereof to her was duly made and recorded. Moses, up to the last-named day, and after that Augusta, occupied the dwelling-house and other buildings on the farm, and carried on the farm as they severally thought proper, hiring the help, determining what crops should be raised, and raising the same, and, in general, deciding all questions relative to carrying on the farm. After November 11, 1876, Moses acted as agent for Augusta.

After August 15, 1876, Dickinson declined to be responsible for payment of hired help, or for seed purchased for raising crops; and, while claiming the crops, left the payment of help, of taxes, and of what might be required for fertilizers, to Moses; and there was no agreement to repay either Moses or Augusta for what they paid for labor, taxes, fertilizers and other expenses, except as above stated. In the fall of 1877, Moses having sold broom corn to pay taxes, the defendant denied his right to do so, and claimed that the crop belonged to the mortgagees. There was no notice to the defendant, or to Dickinson, till June 1878, that Augusta was carrying on the farm. At that time, in a conversation between the defendant and Augusta, she asked what the mortgagees claimed. The defendant informed

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her of the mortgages; that the mortgagees had taken possession for the purpose of foreclosure, and to take the rents and profits; that the crops raised belonged to the mortgagees, and that those who raised them would be entitled to a reasonable compensation for the labor. She said she must have enough of the crops to pay the plaintiff. The defendant replied, that the mortgagees objected to her taking any of the crops to pay him. She said she had borrowed $150 of him to raise crops. The defendant said the mortgagees expected to pay her what was just and reasonable for raising the crops, and, when they settled with her, she could pay the plaintiff.

In May 1877, after the tobacco crop was sown and had come up, Augusta borrowed of the plaintiff $150, of which she used $50 to pay the taxes for 1876, about $50 for hired men then working on the farm, and the balance for seed corn used thereon. At the time of this loan, and as part of the transaction, Augusta agreed to repay the same out of the first crops she should raise, and such agreement was the inducement to the loan.

The tobacco crop of 1877 was severed from the land in September, and hung on poles till about December 1, and, in March 1878, was packed in forty boxes procured by Moses, and paid for by the defendant, and placed in a barn in charge of Augusta. In July 1878, Augusta delivered to the plaintiff four of these boxes, in payment of the loan, and made a bill of sale thereof; and these are the boxes in controversy in this action. At the time of this delivery, the plaintiff was informed by Augusta that the mortgagees claimed the tobacco crop of 1877, and that it should not be disposed of by her.

On December 11, 1878, the forty boxes of tobacco and other crops were replevied by Dickinson and the defendant, against the protest of Augusta. A few days afterwards, a settlement of the replevin suits was effected between Augusta and Dickinson and the defendant, in which there was a reckoning of what was her due; and it was considered what crops Moses and Augusta had had, and what timber they or either of them had cut and sold. Allowance was made for all the property either of them had taken or used, not before accounted for, and the expenses of carrying on the farm were put in. The plaintiff

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took no part in this settlement, but, after the sale of the forty boxes of tobacco and the application of the proceeds upon the mortgage notes, brought the present action.

After the taking possession on August 15, 1876, the defendant made advances from time to time to Moses in aid of expenses of carrying on the farm, insurance, &c. All of these payments were made by the defendant for Dickinson, who reimbursed him therefor.

Until the fall of 1878, nothing was said, either to Moses or Augusta, by Dickinson or the defendant, about their leaving the farm, and it was not insisted that they should leave until the spring of 1879.

On these facts the defendant asked the judge to rule that the plaintiff was not entitled to recover. The judge declined so to rule; and found specially, "that the possession taken and maintained by Dickinson and the defendant, the respective mortgagees, was not a personal occupation of the farm, or the actual appropriation of the rents and profits thereof, including the tobacco in question, except in special cases where it was done by mutual agreement, the case of said tobacco not being one of said special cases; that after November 11, 1876, Augusta A. Porter occupied the farm until the spring of 1879, by permission of said mortgagees, as a matter of mutual convenience, thus becoming a tenant at will of said mortgagees, and holding the farm in subordination to their rights of possession."

The defendant excepted to said finding, and asked the judge to rule that it was not warranted by the facts in the case. The judge declined so to rule.

The judge found for the plaintiff; and the defendant alleged exceptions.

C. Delano, for the defendant.

F. T. Blackmer, for the plaintiff.

FIELD, J. After Dickinson entered upon the tobacco land for breach of the condition of his mortgage, a certificate whereof was duly made and recorded, the legal title to the crops then growing or thereafter raised was in him. After such entry, the legal possession was in the mortgagee, although the mortgagor remained in actual occupation. *Thompson* v. *Vinton*, 121 Mass. 139.

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If Augusta A. Porter became a tenant at will to the mortgagee, she would be entitled to the crops during the tenancy, but this tenancy must be established by a contract between the parties. As a person claiming title under the mortgagor, in subordination to the mortgage, she would have no right to the crops. The title of the plaintiff, therefore, must depend upon some agreement between Dickinson and Augusta whereby she acquired the ownership of the tobacco, or upon some authority derived from him to deliver it to the plaintiff in payment of her debt. *Gilman* v. *Wills*, 66 Maine, 273. *Marden* v. *Jordan*, 65 Maine, 9. *Page* v. *Robinson*, 10 Cush. 99. *Field* v. *Swan*, 10 Met. 112. *Woodward* v. *Pickett*, 8 Gray, 617.

We are not required to determine, in this case, whether, if a mortgagee of a farm, after entry for breach of condition and a certificate and record thereof, does not retain actual occupation, but intentionally permits the mortgagor or any person claiming under him to occupy and carry on the farm, there is not an implied license to the occupant to use and sell, according to the ordinary course of husbandry, the annual crops, even although a tenancy at will may not be created. *Searle* v. *Sawyer*, 127 Mass. 491. *Hapgood* v. *Blood*, 11 Gray, 400.

In this case, the mortgagees made an arrangement with Moses C. Porter in reference to the occupation of the farm. If the effect of that arrangement was to make him their tenant at will, that tenancy could not be assigned to Augusta, and she did not become a tenant at will in his place by the purchase of his equity of redemption. Augusta entered into occupation on November 11, 1876, without the knowledge of the mortgagees, and this occupation continued without their knowledge until the tobacco crop of 1877 was severed from the land. When afterward they learned of her occupation, they informed her that they had taken possession under their mortgages for breach of condition, and in order to take the rents and profits, and that the crops raised belonged to the mortgagees, and that those who raised them were entitled to a reasonable compensation for their labor; and they claimed the tobacco crop of 1877, and forbade her to use it to pay her debt to the plaintiff. This evidence did not tend to prove a letting or demising of the farm to Augusta, or an agreement that the tobacco crop of 1877

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should be hers, or an authority to her to use the crop in the payment of her debts. The plaintiff's title is derived from the delivery to him in July 1878; for the promise of Augusta, at the time of the loan, to pay him out of the crops generally, would give him no title to the tobacco. At the time of this delivery, the plaintiff was informed that the mortgagees claimed the tobacco, and forbade Augusta to dispose of it; so that there is no ground for contending that the defendant is estopped from showing the true state of the title, by reason of any apparent ownership with which he had invested Augusta.

The special finding of the court is, "that after November 11, 1876, Augusta A. Porter occupied the farm until the spring of 1879, by permission of said mortgagees, as a matter of mutual convenience, thus becoming a tenant at will of said mortgagees, and holding the farm in subordination to their rights of possession." A tenant at will, strictly so called, while his tenancy continues, has a lawful possession, and may maintain trespass *quare clausum* against his landlord. *Dickinson* v. *Goodspeed*, 8 Cush. 119. Such a tenancy is created by contract, whereby the premises are let or demised by the landlord to the tenant. The contract may be express, or it may be inferred from circumstances, but it must exist. *Edwards* v. *Hale*, 9 Allen, 462. *Emmons* v. *Scudder*, 115 Mass. 367.

Whether a tenant at sufferance, occupying by permission of his landlord, but without any agreement with him to occupy, was liable in this Commonwealth before the Gen. Sts. *c.* 90, § 25, in assumpsit for use and occupation, is a question which is in doubt; *Merrill* v. *Bullock*, 105 Mass. 486; but permission merely by the landlord to a tenant at sufferance to occupy, does not create a tenancy at will. There must be an agreement shown, whereby the one agrees to hold, and the other to permit him to hold, the possession of the premises. *Edwards* v. *Hale*, *ubi supra*. A mortgagor and his assigns before entry by the mortgagee are not liable to pay rent, or to an action for use and occupation, unless by virtue of an agreement to pay rent or to occupy as a tenant. *Hastings* v. *Pratt*, 8 Cush. 121. *Wilder* v. *Houghton*, 1 Pick. 87.

Whether, since the Gen. Sts. *c.* 90, § 25, a mortgagee after entry to foreclose can maintain against his mortgagor an action

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for use and occupation, in the absence of any agreement to pay rent, has not been decided. *Morse* v. *Merritt*, 110 Mass. 458.

We are uncertain whether the court found that there was an agreement between the mortgagees and Augusta, whereby they demised the farm to her, or a mere permission by them to her to occupy it in subordination to their rights of possession; but, whatever construction may be put upon the finding, we are of opinion that, upon the facts found, the plaintiff was not entitled to recover. *Exceptions sustained.*

FITCHBURG SAVINGS BANK *vs.* GEORGE A. TORREY & another.

Worcester. Oct. 6, 1882. — Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

While the Gen. Sts. c. 63, § 11, (which provided that no conveyance of shares in the capital stock of a railroad corporation should be valid against any other persons than the grantors and their representatives, unless recorded within ten days,) were in force, A., the owner of stock in a railroad corporation, caused a certificate to be issued to B., who executed an assignment in blank on the back thereof, and the certificate thus assigned was delivered to a bank "for the protection of the parties and as collateral security" for a promissory note payable to the bank, and signed by A. as principal and by B. as surety. Subsequently, the railroad corporation consolidated with another, under an agreement by which the stockholders were entitled to receive for each share of stock a bond for a certain amount. A., with the consent of the bank, obtained the certificate of stock and received the bonds, and they were paid in full, and the bank received no benefit from them. *Held*, in an action by the bank on the note against A. and B., that such consent of the bank was a good defence to B., so far as he was injured by the giving up of the stock by the bank.

CONTRACT against George A. Torrey and William O. Brown, on a promissory note for $20,000, dated January 1, 1869, signed by Torrey as principal and by Brown and H. A. Blood as sureties, jointly and severally, and payable on demand to the plaintiff. Torrey was defaulted, and Brown alone defended. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows:

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It appeared that the loan, in consideration of which this note was given, was made by the plaintiff to Torrey on May 19, 1869, the note being dated back to January 1, 1869. The evidence tended to show that Torrey applied to Brown to sign the note as surety, and Brown objected to doing so; that thereupon Torrey said he would deposit as collateral to the note two hundred shares of the stock of the Fitchburg and Worcester Railroad Company, and Brown then assented to signing the note; that, on May 19, Torrey caused to be issued to Brown a certificate of stock, (which stated on its face that it was "transferable on the back hereof by himself or attorney, and valid to the purchaser only when recorded in the treasurer's book and a new certificate given to the owner thereof,") and brought the same to Brown; that he and Brown went with it directly to the plaintiff, Brown having executed an assignment in blank of said shares on the back of the certificate, and delivered it to the plaintiff, and said to the plaintiff that the stock was deposited for the protection of the plaintiff and the parties and as collateral security for the note.

On June 28, 1869, by an agreement between the two corporations and by vote of the stockholders of each, a consolidation of the Fitchburg & Worcester Railroad Company with the Boston, Clinton & Fitchburg Railroad Company was consummated, to take effect on July 1, 1869, upon the following terms: The Fitchburg & Worcester Railroad Company was permitted to issue to its stockholders its coupon bonds, payable in twenty years, with the right of redemption in five years, to the full amount of its capital stock, each stockholder to receive an amount of bonds equal to $100 for each share of stock, and to receive in addition one share of the stock of the consolidated road, which retained the name of the Boston, Clinton & Fitchburg Railroad Company, for one share of the Fitchburg & Worcester Railroad Company; and on the same day the stockholders of the Fitchburg & Worcester Railroad Company voted to issue to its stockholders of record at the close of business on June 30, 1869, its coupon bonds, in accordance with said agreement. At the close of business on June 30, 1869, the defendant Brown was the stockholder of record of said two hundred shares, and the plaintiff bank had the certificate of said stock

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with the blank assignment thereon, and the railroad company had notice that the plaintiff held the same as collateral security, and had such notice at the time the dividend was declared.

There was evidence tending to show that the plaintiff consented to the taking by Torrey of the $20,000 of coupon bonds issued upon the two hundred shares of stock; and that it directed the railroad company to deliver said bonds to Torrey; and that the treasurer of the Fitchburg & Worcester Railroad Company delivered to Torrey the bonds in question; that these were paid in full; and that the plaintiff never received any benefit therefrom.

The plaintiff asked the judge to rule, that, "if the plaintiff bank, by its officers, did consent that Torrey might take the scrip dividend for his own use, it gave the treasurer of the railroad no sufficient authority to pay the same to Torrey without the consent of Brown, and such consent of the bank is no defence to this action."

The judge declined to give this instruction, and instructed the jury, "that, as against Brown, the bank had the right to the bonds (which, in the case, were sometimes called 'scrip dividends'), and the railroad company would be authorized to deliver the same on the order of the bank without Brown's consent; that the provision of the certificate, that an assignment should not be available to the assignee without the transfer on the books of the company, was a provision for the benefit of the corporation, and, as against Brown, the assignment gave the bank the right to receive the bonds; and that if the plaintiff bank, without the knowledge or consent of Brown, authorized the railroad company to deliver the bonds to Torrey, or consented to the delivery of the bonds to Torrey, Brown would thereby be relieved *pro tanto* from his liability on said note."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. C. Hartwell, for the plaintiff.

F. P. Goulding & F. T. Blackmer, for the defendant.

FIELD, J. The transfer of shares of stock in railroad companies incorporated by this Commonwealth is regulated by statute.

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The Gen. Sts. *c.* 63, § 11, in force when these transfers were made, provide that the shares "may be transferred by a conveyance in writing, recorded either by the treasurer in books to be kept in his office or by an officer duly authorized by the directors in books to be kept at such other place as they may appoint. When recorded in such other place, they shall within ten days thereafter be also recorded in the books kept by the treasurer; and no conveyance of shares shall be valid against any other persons than the grantors or their representatives, unless so recorded. On making the transfer, a new certificate shall be granted." See also Rev. Sts. *c.* 39, § 52; Sts. 1874, *c.* 372, § 44; 1881, *c.* 302; Pub. Sts. *c.* 112, § 56.

The transfer of the shares from Torrey to Brown, the record thereof, and the issuing of a certificate to Brown in his name, passed the legal title to the shares to Brown, although he held them as security to indemnify him against his liability on the note. Brown became a stockholder of the corporation. *Holyoke Bank* v. *Burnham*, 11 Cush. 183.

The execution of the assignment on the back of the certificate by Brown, and the delivery of the certificate with this assignment by Brown, with the assent of Torrey, to the bank, passed, as between the parties, all the interest of Brown and Torrey in the shares to the bank, to hold as collateral security for the payment of the note. *Dickinson* v. *Central National Bank*, 129 Mass. 279. *Cushman* v. *Thayer Manuf. Co.* 76 N. Y. 365.

Such a title is sometimes called an equitable title with an irrevocable power to acquire the legal title, and sometimes a legal title as between the parties; but this is a question of the proper use of words. The bank had a right to fill the blank in the assignment so as to make it an assignment to itself, and then to present it to the corporation for record, and to receive a new certificate in its own name; and without such record, after notice to the corporation that the bank held the certificate of these shares as collateral security, the corporation could not rightfully issue a new certificate of the shares to any other person than the bank, except by its consent, unless that person's title to the shares was superior to that of the bank. *Bank* v. *Lanier*, 11 Wall. 369. *Dickinson* v. *Central National Bank*, *ubi supra*.

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Whatever, before the St. of 1881, *c.* 302, may have been the law in regard to the right of paying ordinary dividends upon stock to the owner of record at the time they are declared, although notice may have been previously given of a transfer of the stock which has not been presented for record, (see *Ellis* v. *Essex Merrimack Bridge*, 2 Pick. 243; *Sargent* v. *Essex Marine Railway*, 9 Pick. 201,) yet the bonds in this case were not dividends upon the stock. It was a part of the arrangement under which the two roads were consolidated, that the stockholders of the Fitchburg & Worcester Railroad Company should receive for each share of stock a bond of that road for $100 and one share of the stock of the consolidated road. The bonds were a substitute in part for the stock, and belonged to the person who owned the stock. In the absence of any notice to the contrary, the corporation would have the right to assume that the owner of record was the actual owner of the stock. In the case at bar this was Brown. But a delivery of these bonds by the railroad company to the bank would have been good as against Brown, because the bank, as against him, was the owner of the stock, and was entitled to receive the bonds issued for the stock and to hold them upon the same terms as it held the stock, and, after notice to the company that the bank held the stock and a demand by it for the bonds, the railroad company could rightfully deliver the bonds only to the bank.

The jury must have found that the bank authorized the railroad company to deliver the bonds to Torrey, or consented to such delivery without the knowledge or consent of Brown. The consent of the bank, as these words are used in the exceptions, cannot be taken to mean merely non-action on the part of the bank, or negligence on its part to demand the bonds, but must mean an actual authority or permission by the bank to deliver the bonds to Torrey; neither can the words be taken to mean a conditional consent by the bank, to the effect that the bank would consent to such a delivery if Brown would consent; but they must mean an absolute consent or permission. Such a consent is tantamount to a direction or authority by the bank to deliver the bonds to Torrey; and, as the bonds have thus been lost to Brown, he is entitled to be put in the same position he would be in if the bank had itself received the bonds. The

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English cases perhaps go further than this. *Wulff* v. *Jay*, L. R. 7 Q. B. 756. *Polak* v. *Everett*, 1 Q. B. D. 669.

It is immaterial whether the stock be regarded as a security to the bank given by Torrey or by Brown; it was a security to which Brown was entitled if he paid the note, and to the extent of the value of the bonds it has been lost to him by the act of the bank.

This is an action against both Torrey and Brown on a note signed by them with one Blood, in which the signers jointly and severally promised to pay twenty thousand dollars on demand to the plaintiff. Blood was not made a party, and Torrey has been defaulted. We suppose that this action was brought against two of the three promisors pursuant to the Gen. Sts. *c.* 129, § 4, under which separate judgments can be entered; *Hawkes* v. *Phillips*, 7 Gray, 284; and the point has not been taken that this defence cannot be made by a surety in a joint action at law against principal and surety, because it would require different judgments to be entered against joint defendants, and it need not be considered, as it is not applicable to the case. *Baker* v. *Briggs*, 8 Pick. 122. *Carpenter* v. *King*, 9 Met. 511.

In an action at law against the surety alone, he can avail himself of this defence, and need not resort to equity; *Guild* v. *Butler*, 127 Mass. 386; and this is essentially an action against the defendants severally. The instruction of the court was correct, that Brown would be relieved from liability to the extent of his loss by reason of the delivery of the bonds to Torrey; and all the rulings of the court were substantially right.

Exceptions overruled.

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THOMAS S. SLOAN *vs.* DANIEL McCARTY.

Worcester. Oct. 6, 1882. — Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

An instrument, signed by the maker and witnessed by a third person, stating that the maker had received of S. a horse, for which he promised to pay S. or order a sum named in one month from date, "said horse to be and remain the entire and absolute property of the said S. until paid for in full by me," is not a promissory note, and an action upon it cannot be maintained which is brought more than six years after its date.

CONTRACT upon the following instrument, signed by the defendant, and witnessed: "$85.00. Rutland, April 5th, 1874. Received of T. S. Sloan, this day, roan horse known as A. M. Brown horse for which I promise to pay T. S. Sloan or order eighty-five dollars one month from date, at the Leicester ——, said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." Writ dated July 15, 1881. The answer set up, among other defences, the statute of limitations. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows:

On April 5, 1874, the plaintiff delivered to the defendant a horse, for which the defendant agreed to pay the plaintiff the sum of $85, and executed and delivered to him the instrument declared on. At the maturity of the instrument, the defendant neglected to pay the same, and continued to keep possession of the horse until September 15, 1874, when the plaintiff demanded payment of the amount due on the instrument, which the defendant neglected and refused to make, but offered to return the horse to the plaintiff, who refused to receive it, for the reason that the horse had greatly depreciated in value, and was not then worth the amount due. The defendant requested the plaintiff to take the horse and sell it, and apply whatever he might receive therefor towards the payment of the amount due, and promised to pay the plaintiff the balance as soon as he could. The plaintiff agreed to do this, and the defendant delivered the horse to him, and, on September 26, 1874, the plaintiff sold it for the sum of twenty dollars, and indorsed that

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amount upon the instrument; and this action was brought to recover the balance due thereon.

If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for him for the amount claimed; otherwise, for the defendant.

F. T. Blackmer & M. H. Cowden, for the plaintiff.

B. W. Potter, for the defendant.

FIELD, J. The contract declared on contains a promise to pay to the plaintiff or order a certain sum of money in one month from date for a horse received of the plaintiff; if this were all, it would be a promissory note, as the recital of the consideration does not affect the character of the contract. But the contract also contains an agreement that the horse shall remain the property of the plaintiff until paid for in full by the defendant. This is not an agreement relating to the manner in which the promise to pay money may be enforced, but is a substantive agreement. The whole contract describes a conditional sale of a horse. If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale, and the defendant then would have no right to the horse, and would no longer be liable to pay the note. If the plaintiff should insist upon the performance of his promise by the defendant, the obligation of the defendant to pay the money is in legal effect conditional upon the title to the horse vesting in him when the money is paid in full, and this condition appears on the face of the contract.

The contract contemplates that the payment of the money by the defendant and the transfer of the title to the horse from the plaintiff should be simultaneous acts; and if the horse should die, for example, within the month, without fault on the part of the defendant, the plaintiff would be disabled from transferring the title, and could not maintain an action on the contract. *Swallow* v. *Emery*, 111 Mass. 355. The contract is something more than a promise to pay money, and the promise to pay money is not a promise to pay it absolutely and at all events; and therefore the contract is not a promissory note within the meaning of the Gen. Sts. *c.* 155, § 4, on which, if signed in the presence of an attesting witness, an action could be brought, under § 7, at any time within twenty years after the cause of

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action accrued. *Hartley* v. *Wilkinson*, 4 Camp. 127. *Cook* v. *Satterlee*, 6 Cow. 108.

As the action was not brought within six years after the cause of action accrued, the entry must be,

Judgment for the defendant.

ALFRED D. WARREN *vs.* WARREN THREAD COMPANY & another.

Worcester. Oct. 9, 1882. — Feb. 28, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The right to use trade-marks, in connection with a manufacturing business, which are not personal in their character, but designate merely the place or establishment at which the goods are manufactured, passes to the assignee in insolvency of the owner, under the Gen. Sts. c. 118, § 44.

MORTON, C. J. This bill in equity alleges that the plaintiff, in December 1879, took the benefit of the insolvent laws of this State; that before his insolvency he carried on the business of manufacturing thread in Ashland, and in his business used, and had the right to the exclusive use of, certain trade-marks, copies of which are annexed to the bill; that the assignee in insolvency, who is one of the defendants, claims that the right to use the trade-marks passed to him as a part of the plaintiff's property; that the other defendant is using the said trade-marks; and it seeks to restrain the defendants from selling or using said trade-marks.

The demurrer raises the question whether, notwithstanding the insolvency proceedings, the plaintiff retains the exclusive right to the use of the trade-marks. It is apparent upon inspection that these are not mere personal trade-marks, the use of which by any other person than the plaintiff would operate as a fraud upon the public. His name does not appear upon any of them except one, and in that it is a subordinate part of the trade-mark. They are all designs or symbols designating the place or the establishment at which the thread is manufactured, and not implying any peculiar personal skill in the plaintiff as

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the manufacturer, or importing necessarily that it is manufactured by him.

Whatever may be the law as to a trade-mark which is strictly personal, it is the settled law that the right to use a trade-mark in connection with the business in which it has been used is property which will be protected by the courts, and which may be sold and transferred. *Emerson* v. *Badger*, 101 Mass. 82. *Gilman* v. *Hunnewell*, 122 Mass. 139. In *Sohier* v. *Johnson*, 111 Mass. 238, the right to use such a trade-mark was recognized as property which would pass to an assignee, as an incident, under a transfer of the business and good will.

In *Kid* v. *Johnson*, 100 U. S. 617, the court say: "When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by the original designer." See also *Trade-mark cases*, 100 U. S. 82. The same principle is recognized in the English law; and it has been held that, under the bankrupt law, a trade-mark passes to the assignee of the owner. *Leather Cloth Co.* v. *American Leather Cloth Co.* 11 H. L. Cas. 523. *Motley* v. *Downman*, 3 Myl. & Cr. 1. *Hudson* v. *Osborne*, 39 L. J. (N. S.) Ch. 79.

Upon the authorities, and upon principle, it is clear that, before his insolvency, the plaintiff had a property in his trade-marks which would be protected by the law, and which he had the right to sell and assign, at least in connection with his business and establishment. The insolvent law provides that "the assignment shall vest in the assignee all the property of the debtor real and personal which he could have lawfully sold, assigned or conveyed." Gen. Sts. *c.* 118, § 44. Under this statute, all the plaintiff's property which he could assign passed to his assignee. It includes, *ex vi termini*, his manufacturing establishment, machinery, tools and fixtures, manufactured goods, and

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the right to use the trade-marks in connection with the establishment and goods.

It necessarily follows that he has no exclusive right to use these trade-marks, and no ground for maintaining this bill.

Exceptions overruled.

F. A. Gaskill, for the plaintiff.

B. L. M. Tower, for the corporation.

M. F. Dickinson, Jr. & H. R. Bailey, for the assignee.

WILLIAM O. BROWN, executor, & another *vs.* NELLIE H. COREY.

Worcester. Oct. 5, 1882. — Feb. 28, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

Under the Pub. Sts. *c.* 156, § 35, this court has no power, in contested probate cases, to award counsel fees or other expenses, as "costs," in addition to the taxable costs; and such power does not exist independently of the statutes.

APPEAL from a decree of the Probate Court allowing the will of Walter Heywood. Hearing before *C. Allen*, J., who reported for the consideration of the full court the following case:

Issues were framed for a jury, and a verdict was rendered sustaining the validity of the will. The decree of the Probate Court was affirmed, and the case was remitted to that court for further proceedings.

The executor of the will took no part in the trial, but the case was carried on by the other appellee, Lydia R. Heywood, the widow and one of the legatees; and all expenses of counsel and witnesses were incurred by her. She moved that her costs, to be taxed as between solicitor and client, might be ordered to be paid by the appellant, or out of the estate of the deceased. The presiding justice ordered that the taxable costs be paid to her out of said estate, and was of opinion that, in justice and equity, the other reasonable charges and expenses of establishing the will should also be paid to her out of said estate; but, being of

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opinion that he had no legal right to order such other charges and expenses to be paid out of the estate, declined, for this reason only, to order the payment out of the estate of any charges and expenses except the taxable costs as above stated. If such reasonable charges and expenses could legally be ordered to be paid to her out of the estate, the same were to be taxed by a single justice.

F. P. Goulding & H. C. Hartwell, for the appellee.

G. A. Torrey, for the appellant.

MORTON, C. J. The decision of the question presented in this case turns upon the construction of our statutes regulating costs in probate proceedings. The statute provides that, "in cases contested either before a Probate Court or before the Supreme Court of Probate, costs in the discretion of the court may be awarded to either party to be paid by the other, or to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require." Pub. Sts. *c.* 156, § 35.

If this were a new statute, to be construed by itself, there would be ground for the argument that the amount of the costs was to be within the discretion of the court, as well as the party to or by whom they were to be paid. But, upon examining the history of this provision, we think it cannot fairly receive this construction. It is taken without change from the General Statutes. Gen. Sts. *c.* 117, § 25. The provision in the General Statutes was intended as a reënactment of the Rev. St. *c.* 83, § 47, which provided that, "in all cases that are contested, either before the judge of probate, or in the Supreme Court of Probate, the said courts respectively may, in their discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate which is the subject of the controversy, as justice and equity shall require." By the natural construction of this provision, the discretion applies to the power to award among the parties, and not to the thing to be awarded, which is defined as "costs," a term of frequent occurrence in our statutes, meaning legal or taxable costs, and not including counsel fees. The change in the arrangement of the language, in the reënactment of this provision in the General Statutes, was probably accidental, as the report of the

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commissioners does not suggest, and there is nothing to lead us to suppose, that any change in the law was intended. The provision of the Revised Statutes was derived from the Sts. of 1783, *c.* 46, § 4, and 1817, *c.* 190, § 44. Under the latter statute, which provided that the courts "may in their discretion award reasonable costs to either or both parties, in all those cases where justice shall require it," it was held that legal costs only could be allowed, and not counsel fees or other expenses. *Swan* v. *Picquet*, 4 Pick. 465.

Similar statutes have received a similar construction. The Rev. Sts. *c.* 109, § 21, provided that in a trustee process, when a claimant is admitted as a party, "the court may, at their discretion, award costs, between him on the one part, and the attaching creditor and the supposed trustee, or either of them, on the other part, as justice and equity may require," which was reënacted with some change of language in the Gen. Sts. *c.* 142, § 73. It was held that the discretion related only to the party by whom the costs were to be paid, and not to the amount of the costs. *Morrison* v. *McDermott*, 6 Allen, 122. So in the provision of the Rev. Sts. *c.* 90, § 90, that "the court may, upon every such inquiry, award to either party such costs, as they shall think just and reasonable," it was held that the term "costs" meant "taxable costs as ordinarily taxed; which, under our system, excludes all charges for counsel fees, except in the cases where specially given by statute." *Guild* v. *Guild*, 2 Met. 229. In view of the history of the statute we are considering, and of the adjudicated cases, we are of opinion that the court has not the power in contested probate cases to award counsel fees or other expenses as "costs;" and therefore that the presiding justice rightly ordered that the legal taxable costs only should be paid out of the estate.

It is further contended that the court has this power independently of the statutes. It is the common practice, in bills for instructions by executors or trustees, and in other cases, where the suit is brought to solve difficulties created by some ambiguity or obscurity in a will or other instrument, to allow costs, taxed as between solicitor and client, to be paid out of the estate or fund which is the subject of controversy. But cases of this character have no application to probate proceedings

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under our system. The express provisions of the statutes as to costs exclude any power in the court to adopt and apply any rule of costs contrary to those provisions. *Order affirmed.**

JAMES M. PICKENS, administrator, *vs.* WILLIAM F. DAVIS.

Plymouth. October 17, 1882; January 4. — February 3, 1883.

If a will, which was duly executed, and which contained a clause expressly revoking former wills, is cancelled, it is a question of intention, to be collected from all the circumstances of the case, whether an earlier will, which has not been destroyed, is revived by such cancellation; and, in the absence of affirmative evidence that the testator intended to revive the earlier will by the cancellation of the second, the earlier will will be held not to be revived.

Oral declarations of a testator, made after the cancellation of a will, are admissible in evidence for the purpose of showing whether he thereby intended to revive a former will which has not been destroyed.

APPEAL from a decree of the Probate Court, allowing the will of Mary Davis. Hearing at May term 1881, before *Morton*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

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* A similar decision was made in Middlesex, on the same day, in the case of

WILLIAM H. MORRILL, executor, *vs.* GEORGE WISEMAN & another.

APPEAL, by the executor of the will of Robert Wiseman, from a decree of the Probate Court disallowing said will. At the hearing, before *Field*, J., the usual issues were framed for a jury, who returned a verdict sustaining the will.

The attorneys for the appellees moved that the court, in its discretion, order that the costs and expenses of the appellees (including reasonable counsel fees) be paid out of said estate.

The judge was of opinion that the appellees should be allowed taxable costs, to be paid out of the estate, and that the appellees should be paid counsel fees in the sum of $150 out of the estate; but, being in doubt as to whether it was in the power of the court to make such order as to counsel fees, the question was reserved for the consideration of the full court.

J. A. Maxwell, for the appellees.

J. W. Hammond, for the appellant.

MORTON, C. J. This case is governed by *Brown* v. *Corey*, *supra*.

Taxable costs only allowed.

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The case was argued at the bar in October 1882, and was afterwards submitted on briefs to all the judges.

H. Kingman, for the appellee.

E. Robinson, for the appellant.

C. ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this Commonwealth. In *Reid* v. *Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laughton* v. *Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has been often said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.) 154–156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824, in *Usticke* v. *Bawden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a latter, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also *Moore* v. *Moore*, 1 Phillim. 406; *Wilson* v. *Wilson*, 3 Phillim. 543, 554; *Hooton* v. *Head*, 3 Phillim. 26; *Kirkcudbright* v. *Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch* v. *Phillips*, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is

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said that, "if a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (p. 529, *n.*). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict. *c.* 26, § 22 of which provided, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reëxecution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. *Major* v. *Williams*, 3 Curt. Ecc. 432. *James* v. *Cohen*, 3 Curt. Ecc. 770, 782. *Brown* v. *Brown*, 8 El. & Bl. 876. *Dickinson* v. *Swatman*, 30 L. J. (N. S.) P. & M. 84. *Wood* v. *Wood*, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. *Cutto* v. *Gilbert*, 9 Moore P. C. 131. See also *Nelson* v. *McGiffert*, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in *James* v. *Marvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in *Simmons* v. *Simmons*, 26

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Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin* v. *Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell* v. *Lively*, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also *Barksdale* v. *Hopkins*, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. *Bohanon* v. *Walcot*, 1 How. (Miss.) 336. *Scott* v. *Fink*, 45 Mich. 241. It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246. 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. *Lawson* v. *Morrison*, 2 Dall. 286, 290. *Boudinot* v. *Bradford*, 2 Yeates, 170; *S. C.* 2 Dall. 266. *Flintham* v. *Bradford*, 10 Penn. St. 82, 85, 92.

On the other hand, in *Taylor* v. *Taylor*, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall* v. *Beatty*, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, statutes have been enacted substantially to the same effect as the English statute above

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cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas and Virginia, and probably in other States. Concerning these statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that

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such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. *Major* v. *Williams*, and *Dickinson* v. *Swatman*, above cited. *Rudisill* v. *Rodes*, 29 Grat. 147. But this results from the express provision of the statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of

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revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous or subsequent, may be proved in evidence.

In the great case of *Sugden* v. *St. Leonards*, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen* v. *Keen*, L. R. 3 P. & D. 105, is to the same effect. See also *Gould* v. *Lakes*, 6 P. D. 1; *Doe* v. *Allen*, 12 A. & E. 451; *Usticke* v. *Bawden*, 2 Add. Ecc. 123; *Welch* v. *Phillips*, 1 Moore P. C. 299; *Whiteley* v. *King*, 10 Jur. (N. S.) 1079; *Re Johnson's will*, 40 Conn. 587; *Lawyer* v. *Smith*, 8 Mich. 411; *Patterson* v. *Hickey*, 32 Ga. 156; 1 Jarm. Wills, (5th Am. ed. by Bigelow,) 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited, in *Collagan* v. *Burns*, 57 Maine, 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court *Reversed.*

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PHILIP LOWE *vs.* ALEXANDER MOORE.

Bristol. Oct. 24, 1882. — Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The purchaser of land sold under a power contained in a mortgage may maintain an action, on the St. of 1879, *c.* 237, against the mortgagor, to recover possession of the land.

ACTION on the St. of 1879, *c.* 237, to recover possession of a parcel of land in New Bedford.

At the trial in the Superior Court, before *Colburn*, J., it appeared in evidence that, in June 1876, the defendant executed and delivered a mortgage deed, with a power of sale contained therein, of the premises described in the plaintiff's writ to secure a note of $1500, payable five years from date to one Moses G. Tucker; that the power in the deed provided "that Moses G. Tucker or his assigns may purchase at said sale, and that no other purchasers shall be answerable for the application of the purchase money;" that on December 31, 1881, the premises were sold by public auction, according to the provisions of the power of sale, to the plaintiff; and that a deed from Tucker, under the power and pursuant to the sale, with the usual covenants, was executed and delivered to the plaintiff, who afterwards demanded of the defendant possession of the premises, and then brought this action. No question was made that the plaintiff acquired a good title under these proceedings.

The defendant contended, and asked the judge to rule, that, upon these facts, the action could not be maintained. The judge declined so to rule, but ruled that the plaintiff could maintain the action; and ordered the jury to return a verdict for the plaintiff. The defendant alleged exceptions.

E. L. Barney, for the defendant.

F. C. S. Bartlett, for the plaintiff.

FIELD, J. The ruling was right. The purpose of the St. of 1879, *c.* 237, was to furnish to the person who has a valid title to the estate a speedy method of obtaining possession of it, immediately upon the foreclosure of the mortgage by a sale under the power. That person is the purchaser at the sale. *Warren* v. *James*, 130 Mass. 540. *Harris* v. *Carmody*, 131 Mass. 51.

Exceptions overruled.

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ELIZABETH A. IDE *vs.* STEPHEN PIERCE, executor.

Bristol. Oct. 25, 1882. — Feb. 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action by E. against the executor of the will of M., for money had and received, there was evidence tending to show that a deposit was made by a third person in a savings bank, and a deposit-book was taken in the name of "E. or M., or the survivor of them;" that M. drew the money from the bank during the life of E.; and that the amount so drawn out was put in the bank by the depositor as a perfected gift to the uses declared by the terms of the deposit-book, and that M. appropriated the money to her own use. E. admitted that she put no money of her own in the bank, and that she never had any exclusive possession or control of the deposit-book, and had no knowledge of the existence of such deposit until about the time it was withdrawn by M., which was after the death of the depositor. The evidence showed that M. had possession of the deposit-book when she withdrew the money. The judge instructed the jury, "that if they found the money was deposited by some third person in the name and to the use of 'E. or M. or the survivor of them,' and that such gift was completed by a transfer and delivery, and by a surrender of all control on his part over the fund, then the legal effect of such deposit would be the same as if in the name of 'E. and M. and the survivor of them;' and that during their joint lives they would be entitled each to one half the dividends, and upon the decease of either the fund would go to the survivor." *Held*, that the evidence did not establish a trust; that it was for the jury to determine what were the terms of the gift; and that the instruction given was misleading.

If the books of a corporation are admissible in evidence, and are not within the jurisdiction of the court, copies of them properly verified are admissible.

The treasurer of a foreign savings bank, having answered, to an interrogatory in a deposition, that the books of the bank, which were in his custody, showed that the bank had had business with a certain person, was asked to give an exact transcript of the entries in the books relating to the business. His answer was, "See statement annexed." What purported to be a transcript of the books relating to the business was annexed to the deposition. *Held*, that it sufficiently appeared that the transcript had been compared with the originals, and was a true copy.

CONTRACT, against the executor of the will of Mary Ide, for money had and received. At the trial in the Superior Court, before *Staples*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. H. Fox, (*W. E. Fuller* with him,) for the defendant.

J. Brown, for the plaintiff.

FIELD, J. It appears that evidence was admitted tending to prove that a deposit was made in the Providence Institution for Savings by Nathan Ide, or some other person, and that a

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deposit-book was taken in the name of "Elizabeth A. or Mary Ide, or the survivor of them;" that Mary drew the money from the bank during the life of Elizabeth; and "that the amount so drawn out was put in the bank by the depositor as a perfected gift to the uses declared in and by the terms of the deposit-book already referred to, and that Mary appropriated this money to her own use." The plaintiff admitted "that she put no money of her own in the bank, and that she never had any exclusive possession or control of the deposit-book, and had no knowledge of the existence of such deposit till about the time it was withdrawn" by Mary, which was after the death of Nathan Ide. The court instructed the jury, "that if they found the money was deposited by some third person in the name and to the use of 'Elizabeth A. or Mary Ide, or the survivor of them,' and that such gift was completed by a transfer and delivery, and by a surrender of all control on his part over the fund, then the legal effect of such deposit would be the same as if in the name of 'Elizabeth A. and Mary, and the survivor of them;' and that during their joint lives they would be entitled each to one half the dividends, and upon the decease of either the fund would go to the survivor."

As against the bank, if the bank were a party to the suit, the deposit-book and the entry in its books would be evidence that it had received money from somebody, and had promised to pay an equivalent amount with its accumulations to "Elizabeth A. or Mary Ide, or the survivor of them." But this evidence alone would not be sufficient to establish that the bank was a trustee of this fund. Money deposited in a savings bank, unless there is an agreement to the contrary, becomes the property of the bank, and the bank becomes a debtor therefor. The evidence was that the bank promised to pay the amount of this debt to Elizabeth A. or Mary Ide, or the survivor of them. The bank would have performed this promise by paying it to either in the lifetime of both, or to the survivor, and would have thus discharged its obligation. No evidence is recited of which the legal effect was to constitute the bank a trustee of the fund, upon a trust to pay one half of the dividends to Elizabeth and one half to Mary during their joint lives, and, on the death of either, to pay the whole fund to the survivor.

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It is contended that, on the facts which the jury must have found, the legal effect of the transaction was that the depositor gave the chose in action against the bank to Elizabeth and Mary in trust to distribute the dividends equally between them during their joint lives, and to hold the principal fund, on the death of either, as the property of the survivor.

We are of the opinion that such is not necessarily the legal effect of a deposit of money in the manner described. If one person deposits money in a savings bank to the credit of another, whether he thereby intends to give it to him is a question of fact to be determined by evidence.

If it is one of the rules of the bank that money shall not be paid except upon presentation of the bank-book, and the depositor retains possession of the bank-book, and never communicates to the person in whose name the deposit is made the fact that he has made the deposit, this is evidence upon the question whether, even if the depositor intended to make a gift, he has fully executed his intention so as to make the gift complete; and any evidence that the deposit was made in this form for any other purpose than to transfer the title to the person to whom it is credited, so that he may draw it for his own use and benefit, would of course be competent evidence upon the question whether a gift was ever intended. *Broderick* v. *Waltham Savings Bank*, 109 Mass. 149. *Clark* v. *Clark*, 108 Mass. 522. *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228. *Pierce* v. *Boston Five Cents Savings Bank*, 129 Mass. 425.

It appears by the exceptions that "the court gave instructions to the jury as to what would constitute a perfected gift, to which no exception was taken." The ruling given to which exception is taken is predicated upon the jury's finding "that such gift was completed by a transfer and delivery, and by a surrender of all control on his part over the fund." If the jury found that the gift was completed, they must have found the terms of the gift, and who the donees were. But it is not clear what is meant in the instruction by this clause which we have just cited. The exceptions state that "the only evidence of any possession of the deposit-book was that Mary had the book when she withdrew the money," although it is previously stated that the defendant offered evidence tending to prove that the money

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deposited was Mary's, and "that she kept full control of the bank-book." There is no evidence recited that Elizabeth ever had possession of the book. What then is meant by a transfer and delivery, and a surrender of all control on the part of the depositor over the fund? Apparently these words mean a transfer and delivery of the deposit-book by the depositor to Mary, and a surrender by him of all control over the fund to her, to the use of "Elizabeth A. or Mary Ide, or the survivor of them." If the depositor delivered this book to Mary, it is important to ascertain the circumstances attending the delivery. If the depositor, having made the deposit with an indefinite intention that the money should be for the use of Elizabeth or Mary, or the survivor, and, retaining the bank-book, had given neither any notice of the deposit, and afterward had given the book to Mary with the expressed intention that the money should belong wholly to her, the gift would be regarded as inchoate until the delivery of the book, and it would then become complete in Mary, and Elizabeth would have no right to the money, or any part of it. But Mary could accept the gift for Elizabeth as well as herself, if the gift was intended for the benefit of both. The book may have been delivered to her with the expressed intention that she should hold the property, which it represented, upon the trust described in the instructions of the court, and she may have agreed so to hold it; but the creation of such a trust must be established by evidence; and the form of this deposit and the delivery of the book are not sufficient to establish it. If this were a bequest of money to Elizabeth or Mary, or to the survivor, it might perhaps be held that "or" should be construed "and," and that the testator intended that Elizabeth and Mary should receive it in equal shares, if both were living at his decease, and that, if only one were then living, she should receive the whole bequest; but these words would not establish a trust for their joint lives, with remainder to the survivor. A gift of this deposit *inter vivos*, with a delivery of the book, is like a gift of money, as the deposit can be drawn at any time, and the donee at once obtains control over the fund. The title to the money passes when the gift is complete, and a present gift of money to A. and B. and to the survivor of them, if put into the possession of A. and B. with the intention

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that they should have the use and control of it, would probably be held to be a gift to A. and B. in equal shares, and the words "to the survivor of them" would be rejected as inconsistent with the gift to A. and B. Future interests in money, if they can be established by oral testimony, must be established by clear and satisfactory testimony.

In the case at bar, no evidence is recited which would warrant the jury in finding that an active trust was created, such as is described in the instruction. There is no evidence that Mary agreed to hold the deposit or the money in trust during the joint lives of herself and Elizabeth. We think that, if this was a completed gift, on the evidence so far as it is before us, it was either a gift to Mary alone, or to Mary and Elizabeth jointly; and that it is for the jury to determine, upon all the evidence, which was intended by the donor; and that it is not now worth while to attempt to decide what the presumption would be if the only evidence was that this credit appeared upon the books of the bank, and that Mary had possession of the book corresponding therewith when she drew the money. What the other evidence was we do not know, but the instruction of the court, we think, may have misled the jury.

The exceptions state that the plaintiff offered evidence tending to prove that the amount drawn out by Mary "was put into the bank by the depositor as a perfected gift to the uses declared in and by the terms of the deposit-book already referred to;" and that this evidence consisted of the deposition of one Blodgett and other evidence. The nature of this other evidence does not appear. Blodgett was the treasurer of the bank, and the defendant objected to the seventh interrogatory and answer in his deposition. The witness had been asked in the sixth interrogatory to state whether, from an examination of the books, records and papers previously testified to have been in his custody as such treasurer, the bank had any business transactions with Elizabeth A. Ide, alone or in connection with Mary Ide, or the survivor of them, between certain dates named; to which he answered, "Yes, it did." The seventh interrogatory and answer were as follows: "*Int.* 7. If it did, what do the books, records and papers in your possession as such treasurer of said institution show? Please answer this question by giving an exact

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transcript and copy of the entries upon your records and books in relation to said business, and also copies of all orders for money, if any, signed by said Elizabeth A. Ide or Mary Ide in relation thereto, one or both of them, giving dates and names in full. *Ans.* See the statement annexed." Annexed to the deposition was a statement purporting to be from the books of the bank. As the books were those of a corporation doing business in Rhode Island, they were not within the jurisdiction of the court, and copies of the books properly verified and attached to the deposition might be received instead of the books. As between the parties to this suit, the books would be evidence that there stood to the credit of Elizabeth A. or Mary Ide, or the survivor of them, and to the debit of the bank, at certain times, certain amounts of money. Whether, as connected with the other evidence, the books would be admissible for other purposes, need not be discussed, as the other evidence is not fully set out. Copies of books attached to a deposition should be admitted, if it appears by testimony that the copies have been compared with the original books, and are true copies. The seventh answer, in connection with other answers, we think is substantially such testimony. *Exceptions sustained.*

WILLARD D. PETTY *vs.* JOHN M. ALLEN.

Bristol. Oct. 27, 1882. — Feb. 27, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

It is a good defence to an action for wrongfully taking and detaining the plaintiff's goods, that the defendant restored the goods to the plaintiff, and carried them to a place designated by him and stored them there for him, under an oral agreement that the plaintiff would release the defendant from any claim he had against him for the taking and detention.

The objection, that an agreement relied upon in defence of an action was made on the Lord's day, not taken at the trial, is not open upon a bill of exceptions.

TORT. Trial in the Superior Court, before *Colburn*, J., who allowed a bill of exceptions, in substance as follows:

It appeared that on Sunday, August 14, 1881, the plaintiff, with one or more loads of fruit, stationed himself in Westport,

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within half a mile of a camp-meeting, on land, the owner of which had given his consent, for the purpose of then and there selling such fruit.

The plaintiff introduced evidence tending to prove that the defendant took under his control, and in his custody and charge, all of said fruit, and kept the same under such control from about nine o'clock in the morning until about two o'clock in the afternoon of that day, when they were returned to the plaintiff under the conditions that they were to be taken from there and stored in a barn near by, and that he was not to come on the grounds again for one year.

The defendant introduced evidence tending to prove that, during the time he had charge and control of the plaintiff's goods, the plaintiff, at his request, gave some directions as to the loading and handling the goods, and assisted therein; that when they were returned to the plaintiff, it was with the understanding and under the agreement that, if the defendant would remove the fruit to a barn some distance off and deliver it to the plaintiff there, he would accept it and not return to the grounds, and would make the defendant no trouble on account of the taking; and that the fruit was so delivered and accepted.

The plaintiff asked the judge to rule that any taking or handling or exercising control of the plaintiff's goods by the defendant, without the plaintiff's previous consent, was an act of trespass for which he was liable to the plaintiff; and the fact that the plaintiff afterwards consented to, and in fact did, receive back the goods, did not release the defendant for the taking, and he was liable therefor, notwithstanding such consent and release.

The judge instructed the jury that, upon the evidence, there could be little doubt that the defendant did take charge and control of the plaintiff's goods; that, upon the evidence, he had no right to do so; and that, if nothing else appeared, the plaintiff was entitled to recover such damages as he had sustained in consequence of such taking and detention until he received them back; but that, if the parties entered into an agreement, by which the plaintiff agreed that, if the defendant would take the goods and carry them and store them in a certain barn designated by the plaintiff, the plaintiff would accept the goods and not return to the grounds, and release the defendant from any

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claim he had against him for the taking and detention, and the defendant assented to the agreement and did deliver and store the goods as agreed, and the plaintiff accepted them under the agreement, he was not entitled to recover in this action.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

A. N. Lincoln, for the plaintiff.

H. M. Knowlton & A. E. Perry, for the defendant.

W. ALLEN, J. The defendant did more than to restore the goods he had wrongfully taken. He carried them to a place designated by the plaintiff, and stored them there for him. This was a sufficient consideration for a release or waiver by the plaintiff of the damages for the taking, and the instructions given to the jury were correct.

It is objected that the agreement on which the defendant relies was made on the Lord's day, and that, for that reason, the defendant cannot avail himself of it. It is a sufficient answer that that objection was not taken in the court below, and no ruling was asked or made in regard to it.

Exceptions overruled.

WATUPPA RESERVOIR COMPANY *vs.* CITY OF FALL RIVER.
TROY COTTON AND WOOLLEN MANUFACTORY *vs.* SAME.
POCASSET MANUFACTURING COMPANY *vs.* SAME.
FALL RIVER PRINT WORKS *vs.* SAME.
FALL RIVER IRON WORKS *vs.* SAME.
AMERICAN PRINT WORKS *vs.* SAME.

Bristol. Oct. 25, 1882. — Feb. 28, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The St. of 1871, *c.* 133, authorized a city to take the waters of a great pond for the purpose of supplying its inhabitants with pure water; and provided that the city should be liable to pay all damages that should be sustained by any person in his property by the taking of said waters, or by the taking of any land or water rights. Under the authority of this statute, the city passed an order taking a certain quantity per day of the waters of the pond. *Held*, that an owner of a mill privilege on a river half a mile long, which was the outlet of the pond, could maintain a petition, under the statute, for an assessment of the damages to his privilege by the taking by the city of the waters of the pond.

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The St. of 1871, c. 133, authorized a city to take the waters of a great pond for the purpose of supplying its inhabitants with pure water; and provided that the city should be liable to pay all damages that should be sustained by any person in his property by the taking of said waters, or by the taking of any land or water rights. Under the authority of this statute, the city passed an order taking a certain quantity per day of the waters of the pond. A company had been previously incorporated "for the purpose of constructing a reservoir of water in" the pond, "for the benefit of the manufacturing establishments on" a river which was the outlet of the pond; and it had power to build a dam so as to raise the water in the pond to a certain height. Its capital stock had always been owned, and it had been managed, by the mill-owners on the river, each of whom owned the privilege attached to his mill. *Held*, that the corporation could maintain a petition for any damage to its dam or other property caused by the taking by the city of the waters of the pond; and that each mill-owner was the proper party to bring a petition for damages to his privilege by such taking. *Held, also*, that the city was liable for depriving the petitioners of water used for other purposes, as well as for power. *Held, also*, that a corporation, whose lands did not border on the stream, but to whose mill water was conveyed by a canal running through the land of a riparian owner, under a deed giving the right to the flow of water from the stream, had the same rights against the city as the riparian owners.

PETITIONS for the assessment of damages for the taking of water by the respondent. Trial in the Superior Court, before *Colburn*, J., who ruled, as matter of law, upon agreed facts on which the cases were submitted, that each petitioner was entitled to recover a certain sum; and directed verdicts accordingly. The respondent alleged exceptions. The facts appear in the opinion.

T. M. Stetson & J. F. Jackson, for the respondent.

E. R. Hoar, (*G. Marston & J. M. Morton* with him,) for the petitioners.

MORTON, C. J. The St. of 1871, *c.* 133, authorized the city of Fall River to take the waters of the North Watuppa Pond, or any part of them, for the purpose of supplying its inhabitants with pure water. Under the authority of this statute, the city in 1873 passed an order taking one and a half million gallons per day of the waters of the pond.

Section 10 of the act provides that "the city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking respectively of the entire waters of said North Watuppa Pond, or by the taking of any less proportion of said waters, as authorized by the second and third sections of this act, or by the taking of any land, rights of way, water rights or easements."

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A natural stream, not navigable, known as Quequechan or Fall River, flows from the pond for the distance of about half a mile into tide waters, having a fall in the whole of about one hundred and thirty feet, divided into a succession of water privileges. These petitions are brought by several corporations owning and using these water privileges.

The respondent contends that the State is the absolute owner of a great pond, and of the land under it; that it may drain or fill it at pleasure; that the riparian owners on a stream which is its outlet have no rights in the waters of the pond; and therefore that these petitioners have sustained no damage.

It is not necessary to discuss the question as to what may be the extreme rights of the State as to draining, filling or otherwise using the waters of a great pond. If there may be contingencies in which it might divert the waters to the injury of persons owning water rights on the outlet without making compensation, it is clear that the Legislature has not claimed or asserted any such right in this case.

The riparian proprietors on Fall River certainly have water rights, as against all the world except the State. The statute does not give to the respondent the unconditional right to take the waters of Watuppa Pond; it gives the right to take them only upon the condition that the city shall pay all damages to any person injured in his property or water rights by the diversion of the water. It is too clear to admit of doubt, that the intention of the statute was to provide for compensation to the riparian owners on Fall River whose water rights as used by them were injured. Such has been the uniform construction of similar statutes authorizing cities or aqueduct corporations to take the waters of great ponds. *Ipswich Mills* v. *County Commissioners*, 108 Mass. 363. *Bailey* v. *Woburn*, 126 Mass. 416. *Plymouth* v. *County Commissioners*, 16 Gray, 341. It may be added, that the statute we are considering, in §§ 4 and 5, recognizes the Watuppa Reservoir Company and the other petitioners as having water rights which are protected by the statute.

The respondent also contends that, if any petitioner has a claim against the city, it is the Watuppa Reservoir Company alone. This company was incorporated in 1826, "for the purpose of constructing a reservoir of water in the Wattuppa Ponds, so called,

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in the town of Troy, in the county of Bristol, for the benefit of the manufacturing establishments on Fall River." It had power to build a dam so as to raise the water in the ponds two feet higher than it was before raised, and to hold real estate not exceeding ten thousand dollars in value, and personal estate not exceeding five thousand. St. of 1826, *c.* 31. It is a corporation capable of suing and being sued, and therefore may maintain its petition for any damages to its dam or other property caused by the act of the respondent in taking the waters of the pond. But its capital stock has always been owned, and the corporation has been managed, by the mill-owners below, and it is clear from its charter and by-laws that it was formed merely for the purpose of creating a convenient agency to own and manage the dam for the benefit of the mills below. It does not own or control the water rights and privileges of the stream. These are owned by the several mill corporations, each owning the privilege attached to its mill; and it is clear, therefore, that each mill-owner is the only proper party to bring a petition for damage done to his privilege.

The parties have agreed that, in the view of their rights which we have taken, each of the petitioners is injured by the act of the city in taking the water, and have also agreed upon the amount of the damages in each case, except in that of the American Print Works. In that case alone is any question raised as to the measure of damages.*

The American Print Works was established in 1835. In 1857 the Fall River Iron Works, which owned the Metacomet Mill, the lowest mill on Fall River, and whose only title to the use of the water was that of a riparian owner, conveyed to the American Print Works the land on which its buildings are situated, and "one eighth of the current flow of the Fall River." A canal was dug from the pond of the Metacomet Mill to the pond of the American Print Works, and since then the American Print Works has used the water thus supplied, at first for power, and lately for bleaching, cleansing and other operations of print works. Although its works are not directly on the

* The parties agreed that, if this corporation was legally entitled to use the water for purposes other than for power, the damages were $10,000; otherwise, the damages were $741.60.

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stream, we think it has substantially the same rights against the respondent as the other mill-owners. At the time the city took the water, the American Print Works owned and was enjoying a valuable right to use the water of the river, which has been injured by the taking. The respondent contends that it is liable for a diminution of the water considered only as a source of power, and not for any injury to the petitioner by depriving it of water used for bleaching, cleansing or other similar purpose. We cannot adopt this distinction. A riparian owner has the right to use the water of the stream for any legal purpose, provided he does not infringe upon the rights of others, or create a public or private nuisance. The right to use water for other purposes than power is often a very valuable right, especially to a mill, which, like the American Print Works, is the lowest mill on a stream, and therefore not liable by any pollution of the water to injure any one. The provision of the statute that the city shall pay all damages sustained includes damages for injury to the right to use water for other purposes, as well as to the right to use it for power.

Upon the whole case, therefore, we are of opinion that the rulings of the Superior Court were correct.

Exceptions overruled.

STEPHEN WHITE *vs.* JOSEPH DUNN & trustee.

Bristol. Oct. 27, 1882. — Feb. 28, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

The wages of a seaman on a coasting voyage on the Atlantic coast are subject to attachment by the trustee process.

TRUSTEE PROCESS. The Old Colony Steamboat Company, a corporation established by law in this Commonwealth, and having a place of business in Fall River, summoned as trustee of the principal defendant, answered that, at the time of the service of the writ upon it, it was a common carrier of freight and passengers between the port of Fall River in this Commonwealth and the port of New York in the State of New York, its

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course being through the waters of Mount Hope Bay, Narragansett Bay, Long Island Sound, New York Bay, the East River and the North River; that the principal defendant, before and at the time of the service of the writ upon it, was regularly employed by it as a seaman on one of its freight propellers, in making trips between said ports over that course; that it owed him for wages as such seaman the sum of $24, and had in its hands, possession or control no other goods, effects or credits of his; and that he had demanded his said wages of the company and claimed to hold it liable therefor.

The Superior Court charged the trustee on its answer; and the trustee appealed to this court.

J. M. Morton, for the trustee, cited *McCarty* v. *City of New Bedford*, 4 Fed. Rep. 818.

J. M. Wood, for the plaintiff.

MORTON, C. J. The question presented in this case was exhaustively discussed in the opinion in the case of *Eddy* v. *O'Hara*, 132 Mass. 56. That case did not necessarily involve the question, and therefore may not, strictly speaking, have the force of an adjudication; but, upon careful reconsideration of the subject, the reasoning of the opinion satisfies us that, by the law of this State, the wages of seamen engaged in the coastwise trade of the Atlantic coast are subject to attachment by the trustee process. We are therefore of opinion that the judgment of the Superior Court charging the trustee should be affirmed.

We regret that there is a conflict of decisions between this court and the District Court of the United States for the Southern District of New York; but, notwithstanding the respect we have for that court, we are compelled to administer the law of this State as we find it to be. It is not probable that practical injustice will grow out of the conflict. We have held that, if the owners are obliged, by the judgment of an admiralty court, to pay the wages to a seaman, they cannot be charged as his trustees, though the libel upon which the judgment was rendered was filed after the trustee process. *Eddy* v. *O'Hara*, *ubi supra*. It is to be presumed that, if a trustee is charged in a trustee process and pays the amount due for wages upon the judgment, a court of admiralty will respect the judgment, and will not

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compel the owners to pay a second time wages which they have been compelled to pay to the creditor of a seaman and for his benefit, by the judgment of a court of competent jurisdiction.

Judgment affirmed.

CHARLES C. HANSON *vs.* J. W. DODGE.

Essex. Nov. 8, 1882. — Feb. 27, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A contract in writing provided that, in consideration of certain services rendered by the plaintiff, the defendant would pay him a sum named within a certain time after the defendant had sold and received pay for six machines, which had been invented by the defendant and of which he owned letters-patent, he being at that time alone in business. Subsequently he entered into partnership with a third person in the manufacture and sale of the machines, and they sold and received pay for six machines. *Held*, that this was a sale, within the meaning of the contract, whether made for the sole benefit of the defendant, or in behalf of himself and his partner.

CONTRACT. The declaration was as follows: "And the plaintiff says that the defendant, on or about October 30, 1879, in consideration of certain services rendered by the plaintiff to the defendant, executed an agreement in writing and delivered the same to the plaintiff, of which agreement the following is a true copy, viz.:

"'Boston, October 30th, 1879. In consideration of certain services rendered by Charles C. Hanson of Lynn, I hereby agree to pay said Hanson, within ten days from the time that I shall have sold and received pay therefor three Dodge Edge Trimming Machines, the sum of two hundred and fifty dollars, also an additional sum of two hundred and fifty dollars within ten days from the time when I shall have sold and received pay for six of said machines. J. W. Dodge.'

"And the plaintiff says, that although the defendant had, on or about January 1, 1880, sold and received pay for more machines than the number mentioned in said agreement, and that on or about January 1, 1880, more than ten days had elapsed since the defendant had sold and received pay for said machines,

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and although the plaintiff on or about said January 1, 1880, demanded of the defendant payment of said sums mentioned in said agreement, amounting together to the sum of five hundred dollars, yet the defendant neglected and refused, and still neglects and refuses, to pay the plaintiff said sum of five hundred dollars, or any part thereof."

Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions, in substance as follows:

The machine mentioned in the contract was invented by the defendant, and secured by letters-patent, which were owned by the defendant at the time the contract was made, he being then alone in business; subsequently he entered into partnership with one Fifield in the manufacture and sale of said machines.

The plaintiff, to prove the sale of six machines, according to the terms of said contract, introduced evidence tending to show that, more than ten days before the commencement of the action, the defendant, together with Fifield as his partner in business, had sold and received pay for more than six machines. The defendant objected to this evidence; but the judge ruled that a sale made by the defendant would be a sale within the meaning of the contract, whether the same was made for the sole benefit of the defendant, or in behalf of himself and his partner in business.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. M. Raymond & W. E. Macleod, for the defendant.

W. H. Niles & G. J. Carr, for the plaintiff.

W. ALLEN, J. At the time the contract was made, the defendant was engaged in the business of manufacturing and selling the machines of which he held the patent. He subsequently took a partner in the business, and, after that, the copartnership sold the machines, and received pay therefor. We think that this was a sale of the machines by the defendant, within the meaning of the contract; and that the ruling of the court was correct. *Exceptions overruled.*

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EDWARD D. SOHIER & another *vs.* THOMAS LAMB & others.

Suffolk. March 11, 1881; Jan. 26. — Feb. 5, 1883. W. ALLEN, J., absent. HOLMES, J., did not sit.

A corporation conveyed all its property to trustees to secure the payment of certain bonds issued by it and payable to bearer. One of the bonds, duly executed, and payable in five years, with interest coupons attached, was lost before issue. Receivers of the corporation were subsequently appointed by this court, with power to collect the assets of the corporation, pay the debts, and divide the balance among the stockholders. The trustees, at the request of the receivers, released to the receivers the property held in trust, and accepted from the receivers a sum of money as security for the lost bond, until such time as the lost bond and coupons should be paid, or the rights of any holder thereof be extinguished. The receivers paid all the debts of the corporation and the bonds which had been issued. Nine years after these bonds were paid, the lost bond not having been presented for payment, the receivers, being ready to close their trust, brought a bill in equity against the trustees to compel a transfer of the sum of money deposited as security for the lost bond, but did not offer to give security which might avail the bondholder if one should appear. The court ordered notice by publication to any one having an interest in the bond, which order was complied with, and no such person appeared. *Held*, that the bill could not be maintained.

BILL IN EQUITY, filed January 4, 1879, alleging that the plaintiffs were, on March 10, 1870, appointed, by an order of this court, receivers of the East Boston Ferry Company, a corporation duly established according to law, with full power to collect, demand and receive the outstanding debts due the corporation, and all the assets and property thereof, to pay and discharge its debts and liabilities and to pay the balance to the stockholders of the corporation, and to take all proper measures at law and in equity to collect and recover all such property and assets; that the receivers had entered upon their duties, collected claims due the corporation, discharged all its debts and obligations, and paid dividends to the stockholders to an amount stated.

The bill further alleged that the plaintiffs had collected all the assets of the corporation, and had wound up all its affairs, except one claim which would soon be disposed of; that they were desirous of finishing their duties as receivers, and of being discharged by the court.

The bill further alleged, that on July 16, 1866, the corporation had conveyed all of its property to certain persons, of whom the defendants are the successors, in trust, to secure certain

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bonds, which the corporation had authorized to be issued to the amount of $100,000, payable in five years from July 16, 1866; that said bonds were prepared and signed; that one of them to the amount of $5000 with coupons attached for interest at the rate of six per cent per annum, payable semiannually, was never issued nor negotiated, but was lost in some unknown manner, about October 13, 1866, and had never since been seen or heard from, and no payment of the principal or any part of the interest demanded of the corporation, the receivers or the trustees; that the remaining bonds, amounting to $95,000, were issued, and were paid in full on April 1, 1870; that all the provisions of the trust were complied with, except so far as there might be a liability to pay the principal and interest of the lost bond to any *bona fide* holder for value; that the trustees, at the request of the plaintiffs, released to the corporation the property conveyed in trust, and accepted from the plaintiffs the sum of $6500, to be held by the trustees, as substituted security, upon the same trusts as those upon which the trustees held the property previously conveyed to them, as far as applicable, and until such time as such bond and coupons were paid, or the right of any holders thereof, if any there were, was extinguished; that said sum of $6500 and the interest accrued thereon had ever since been held as security for the payment of said lost bond and coupons.

The prayer of the bill was that the defendants be compelled to pay to the plaintiffs said sum of $6500 and interest thereon; and for further relief.

On the filing of the bill, an order of notice was issued, by publication in two newspapers, which recited the facts set forth in the bill, and all persons interested, and especially those claiming any interest in the lost bond, were ordered to appear on a day named.

The trustees alone appeared, and filed answers, admitting the facts alleged in the bill to be true.

At the hearing, before a single justice, a decree was ordered for the plaintiffs, in accordance with the prayer of the bill; and the defendants appealed to the full court.

The case was argued, in March 1881, by *C. A. Welch*, for the plaintiffs, and by *O. W. Holmes, Jr.*, for the defendants; and

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was reargued, in January 1883, by *Welch*, for the plaintiffs, and by *G. O. Shattuck & W. A. Munroe*, for the defendants.

The plaintiffs' counsel, to the point that the bond never had any valid existence, because it was never issued, cited *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Burson* v. *Huntington*, 21 Mich. 415; *Chipman* v. *Tucker*, 38 Wis. 43; *Roberts* v. *McGrath*, 38 Wis. 52; *Roberts* v. *Wood*, 38 Wis. 60.

The defendants' counsel, to the point that, if the bond was lost before issued, it would be held to be a binding obligation in the hands of a *bona fide* holder for value, cited *Worcester County Bank* v. *Dorchester Bank*, 10 Cush. 488; *Ingham* v. *Primrose*, 7 C. B. (N. S.) 82, 85; *Swan* v. *North British Australasian Co.* 2 H. & C. 175; *Gould* v. *Segee*, 5 Duer, 260, 270; *Shipley* v. *Carroll*, 45 Ill. 285; *Clarke* v. *Johnson*, 54 Ill. 296; *Briggs* v. *Ewart*, 51 Mo. 245, 249; *Kinyon* v. *Wohlford*, 17 Minn. 239; *Spitler* v. *James*, 32 Ind. 202.

FIELD, J. The money now in the hands of the trustees is held, as the bill alleges, "as security for the payment of said lost bond and coupons," and was accepted from the receivers to be held by the trustees, as substituted security, upon the same terms as those upon which the trustees held the property previously conveyed to them, as far as applicable, and until such time as such bond or coupons were paid, or the right of any holders thereof, if any there were, was extinguished.

This bond was lost on or about October 13, 1866. Before it was lost, it had been duly executed and prepared ready to be issued, but, it is said, had not been issued. It was for the sum of $5000, payable in five years from July 16, 1866, with interest at the rate of six per cent per annum, payable semiannually, according to the tenor of interest coupons attached. The tenor of the bond nowhere appears in the papers, but it is assumed that it was payable to bearer, and was an instrument negotiable by delivery. As the creditors of the East Boston Ferry Company have all been paid, the money, if received by the plaintiffs, will be distributed among the stockholders of that company.

In 1870, all the bonds actually issued were paid, and the property originally conveyed to the trustees as security for the payment of these bonds was by them conveyed back to the corporation. This was done at the request of the receivers; and,

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to obtain this reconveyance from the trustees, the receivers were compelled to place in their hands this sum of $6500, to be held as security for the payment of this lost bond and its coupons. No one has appeared as the holder of the lost bond, or of any of its coupons, and no one who is a party to this suit has any knowledge or information that the bond or any of its coupons is in existence. All these facts were known to the receivers at the time they placed this money in the hands of the trustees. At the time the bill was filed, about nine years had elapsed from the time of the deposit of the money with the trustees, and meanwhile the principal sum of the bond had become due; but in no other respect had the legal status changed.

There is perhaps a greater probability now that the bond and its coupons have ceased to exist, or have never been, in a legal sense, held by any person, than there was nine years ago, but the law raises no presumption from the facts proved.

It is contended in argument that, as this bond was never issued, it is impossible that it can be an outstanding obligation in the hands of any person. But, if this were the law of this Commonwealth, it has never been determined, as against the holder of this bond or its coupons, if there be any, that this bond was never issued by the corporation, although, as publication of this bill has been made, and no person has appeared, claiming as holder of the bond, or claiming any interest in the trust fund, any decree made in the cause might protect the trustees. But it is, to say the least, doubtful if such is the law of this Commonwealth. See *Worcester County Bank* v. *Dorchester Bank*, 10 Cush. 488; *Wyer* v. *Dorchester Bank*, 11 Cush. 51. Besides, it was as security against the possibility of just this liability, under all the facts then known to these receivers, that this money was deposited with these trustees.

It is also contended that a court of equity, in the exercise of its power of winding up a corporation and of distributing its property among those entitled to it, may take this money and distribute it, and leave the bondholder, if there be one, to recover the value of his debt of the stockholders among whom the property is distributed. It does not distinctly appear by the pleadings that the East Boston Ferry Company has been dissolved, pursuant to the Gen. Sts. *c.* 68, § 35; but, even if it

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has been, this is not an application to have a time fixed within which creditors of the corporation may prove their claims, pursuant to the Gen. Sts. c. 68, § 39, with the view of distributing the "balance remaining" among the stockholders; and it is unnecessary to consider whether a general creditor of a dissolved corporation, who has not proved his claim within the time fixed by the order of the court, can, after the "balance remaining" has been distributed by the receivers among the stockholders, have any remedy against the stockholders.

This is in effect a suit for the purpose of declaring a trust created by the plaintiffs terminated, and of ordering the funds in the hands of the trustees paid to the plaintiffs, on the ground that there is no reason why the trust should longer continue, and it is instituted by the plaintiffs under the power contained in the order appointing them receivers and authorizing them to collect and recover the property of the corporation. It is the specific equitable lien on the trust fund which a bondholder may have which the plaintiffs ask may be dissolved, that they may obtain the money and distribute it among the stockholders of the corporation. The trust has not, according to its terms, expired, whether the money be regarded as substituted for the original trust property, or held on a distinct trust. The bill alleges that the money was to be held by the trustees until such time as such bond and coupons were paid, or the right of any holder thereof, if any there were, was extinguished. The court, as a court of equity, has jurisdiction to enforce and regulate the execution of trusts; and, in the absence of any statute directly applicable to such a case as this, it may be that the court can, after giving such notice as it deems sufficient, proceed to inquire whether there is any person beneficially interested in the trust, and may determine this question, and, if it determines that there is none, may declare the trust terminated, and direct the trust funds to be transferred to the persons entitled to them; and that such a decree would protect the trustees against any personal liability for acts done in compliance with its terms. Assuming this to be so, yet as the plaintiffs do not offer to give any security that may avail the bondholder, if any shall appear hereafter, and as the corporation has probably been dissolved, we think, on the facts of this case, that no decree compelling the

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trustees to pay this fund to the plaintiffs ought, without requiring such security, to be made within the period of the limitation of actions on contracts such as this bond. Without deciding that the statute of limitations of its own force would be a bar to a suit by the bondholder against the trustees to enforce the trust; *Farnam* v. *Brooks*, 9 Pick. 212; *Hemenway* v. *Gates*, 5 Pick. 321; yet, after the lapse of twenty years from the maturity of the bond, the court would not, without special cause, entertain a bill brought for that purpose, and might well act in the distribution of the fund upon the presumption that the liability, if any ever existed, had become extinguished.

Bill dismissed.

AMELIA H. COSTELO *vs.* HORACE S. CROWELL, administrator.

Suffolk. March 15, 1882; January 15. — February 5, 1883.

If an action is brought against an administrator on a promissory note made by his intestate, by an indorsee thereof, and this court sustains the defendant's exceptions on the ground that the note is not a negotiable note, it is within the discretion of the Superior Court to allow the writ to be amended by striking out the name of the plaintiff and inserting that of the payee of the note, although such amendment is after the expiration of two years from the appointment of the administrator.

B. gave A. his promissory note, payable in five years, and declared on its face to be given as collateral security for a certain agreement. On the same day, and as part of the same transaction, the parties entered into an agreement, by which it appeared that A. advanced to B. the amount stated in the note, which amount was used by B. in the purchase of a parcel of land, B. giving his promissory note, secured by a mortgage of the land, to his grantor. B. also agreed to save A. harmless from all losses which might occur "in the decrease or sale of the land," and to pay the sum advanced by A. towards the purchase, and also to pay a certain amount in one year on the mortgage, and the balance of it in five years. B. was to have full control of the land, was to pay all taxes and interest on the mortgage, and to sell the land for the joint benefit of A. and B., the proceeds of the sale, after paying the mortgage, to be divided equally between them. *Held*, that A. could, after the expiration of five years, and after breach of the agreement by B., maintain an action against him on the note.

CONTRACT on a promissory note for $3000, dated July 31, 1868, signed by Thomas Corey, the defendant's intestate, payable five years after date to the order of John F. Costelo, and

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by him indorsed in blank. On the margin of the face of the note were these words: "Given as collateral security with agreement." Writ dated August 10, 1877.

After the former decision, reported 127 Mass. 293, sustaining the defendant's exceptions, on the ground that the instrument declared on was not a negotiable promissory note, the plaintiff moved to amend her writ, by substituting, in place of herself as party plaintiff, the following: "John F. Costelo, this action being brought in the interest and for the benefit of Amelia H. Costelo." This motion was allowed, against the defendant's exception, as was also a motion to amend the declaration by adding the following counts:

The first count was on the note originally declared on, and alleged that the action was brought in the interest and for the benefit of Amelia H. Costelo.

The second count alleged that the defendant's intestate, in consideration of the sum of $3000, paid to him by the plaintiff, made a contract in writing, a copy of which was annexed, (being the note originally declared on,) whereby he promised to pay to the order of the plaintiff the sum of $3000 in five years from July 31, 1868, and alleged a breach.

The third count was similar to the second, except that it alleged the consideration to be the sum of $728.11, paid by the plaintiff to the defendant's intestate, and two promissory notes of third persons, one for $1848.35, and the other for $521.85.

The fourth count alleged that, in consideration of the sum of money and the notes, as set forth in the third count, and also in consideration of a certain agreement entered into by the plaintiff, (a copy of which is printed in the margin,*) the

* "An agreement made this 31st day of July, A. D. 1868, between Thomas Corey of the first part and John F. Costelo of the second part, both of Marlborough, county of Middlesex and Commonwealth of Massachusetts.

"The party of the first part agrees to purchase and take the title deed in his own name of a certain farm of fifteen and one half acres of land, with the dwelling-house and barns thereon, situated in that part of Marlborough called the East Village and known as the Bucklin homestead, for the sum of twelve thousand dollars, on the following terms of payment:

"Three thousand dollars to be paid on the delivery of deed of said buildings and lands. The balance, nine thousand dollars, to be paid by note, to be secured by mortgage on said buildings and lands.

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defendant's intestate entered into a certain contract with the plaintiff, a copy of which was annexed, (being the note declared

"Three thousand dollars to be paid and indorsed on said mortgage and note in one year from the date of said mortgage and note. The balance of said mortgage, six thousand dollars, to be paid in five years from date of said mortgage and note, with interest at six per cent, payable semi-annually.

"The party of the second part has this day contributed and paid unto the said Corey the sum of three thousand dollars, to be used as part of the purchase money, and as first payment for said buildings and lands, as follows: [Then followed the details of the payment by notes of third persons and by money, as alleged in the third count.] Making three housand dollars paid by the said Costelo to the said Corey towards the purchase and first payment of said buildings and lands. And in consideration of the said three thousand dollars paid by the said Costelo to the said Corey, the said Corey agrees to hold the said Costelo harmless from any and all losses which may occur in the decrease or sale of said buildings and lands.

"The said Corey has this day given to the said Costelo his, the said Corey's, own note for three thousand dollars, of even day and date, with interest at six per cent, as collateral security for the said three thousand dollars paid by the said Costelo to the said Corey, and for the fulfilment of this agreement.

"First. The said Corey is to take the title deed of said buildings and lands in his, the said Corey's, own name, and further agrees to pay the three thousand dollars advanced by the said Costelo towards the purchase and first payment of said buildings and lands.

"Second. The said Corey agrees to give his, the said Corey's, own note for nine thousand dollars, with interest at six per cent, secured by mortgage on said buildings and lands, as the balance of the purchase money for the payment of said buildings and lands.

"Third. The said Corey agrees to advance and pay the sum of three thousand dollars in one year from the date of said mortgage and note, said three thousand dollars to be indorsed on said mortgage and note.

"Fourth. The said Corey is to have full control of said buildings and lands. The said Corey agrees to keep said buildings insured and have said farm surveyed into house lots. The said buildings and lands are to be sold for the joint benefit of the said Corey and the said Costelo. The proceeds derived from the sale of said buildings and lands are to be divided equally between the said Corey and the said Costelo, after paying off the said mortgage on said buildings and lands.

"Fifth. The said Corey further agrees to pay the interest on said mortgage, also agrees to pay all taxes and assessments levied on said buildings and lands, also the insurance on said buildings, out of the proceeds derived from the rents and crops of said buildings and lands."

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on,) by which the said intestate agreed to pay the plaintiff the sum of $3000, if he, the said intestate, did not perform the covenants and agreements entered into by him in the contract, a copy of which is printed in the margin on p. 281. The count then alleged a breach of these covenants and agreements.

There were also counts for money had and received, and for money lent.

Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions, which, after setting forth the facts as to the amendment of the writ and declaration, and stating that the defendant was appointed administrator of the estate of Thomas Corey on March 7, 1876, proceeded, in substance, as follows:

The plaintiff introduced evidence tending to show that Thomas Corey was the uncle of John F. Costelo, and that they had had numerous and extended business transactions with each other, covering a period of seven or eight years; that, in June 1868, Corey had entered into a contract with one Sylvester Bucklin for the purchase of the Bucklin homestead; that, for a long time previously, Corey had been desirous and trying to buy said land, as it adjoined the homestead on which Corey lived in Marlborough; that, shortly after the making of this agreement, Corey, not having the ready money necessary, applied to John F. Costelo to advance him $3000 as a loan, which Costelo did, and at that time (on or about July 31, 1868) the note and agreement referred to in the plaintiff's amended declaration were executed and delivered by Corey to Costelo.

There was evidence that the land described in the agreement, a copy of which is printed in the margin on p. 281, was never sold by Corey, with the exception of about two and one half acres (upon which houses had been built), but remained a part of his estate at the time of his death, and was so inventoried, and that the defendant and his wife, a daughter of said Corey, occupy and reside upon a portion of it; that neither John F., James nor Amelia H. Costelo ever received any payments on account of said note or said agreement, nor any part of the proceeds of the sale of said two and one half acres; and that $4000 of the principal of the mortgage note given by Corey to Bucklin still remains unpaid, with some accumulated interest. Said mortgage and note from Corey to Bucklin bore the same

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date as the note declared on, and were written on the same time, namely five years.

This was all the evidence in the case material to the inquiry raised by the bill of exceptions. The defendant offered no evidence. At the close of the plaintiff's case the defendant requested the judge to rule that the action could not be maintained, for the following reasons: "1. That the plaintiff's amendments, before referred to, constituted the bringing of a new suit, and the date of the allowance of said amendments was more than two years after the appointment of the defendant as administrator. 2. That the plaintiff could not maintain an action upon the note until some breach, on Corey's part, of the agreement; that the plaintiff had failed to show any breach of the agreement; and that the plaintiff's remedy, if any, should properly be by a bill in equity upon said agreement, and not by an action at law upon said note."

The judge ruled that the plaintiff could not maintain this action, and directed the jury to find for the defendant. The jury returned a verdict accordingly; and the plaintiff alleged exceptions.

The case was argued at the bar in March 1882, and was reargued in January 1883.

H. E. Swasey & G. R. Swasey, for the plaintiff.

J. G. Abbott, (*E. F. Johnson* with him,) for the defendant.

FIELD, J. The court are unanimously of opinion that the amendment substituting John F. Costelo as nominal plaintiff for Amelia H. Costelo was properly allowed. Gen. Sts. *c.* 129, §§ 41, 82. *Winch* v. *Hosmer*, 122 Mass. 438. *Buckland* v. *Green*, 133 Mass. 421.

Without deciding, it may be assumed, as the defendant contends, that the agreement between Thomas Corey and John F. Costelo, dated July 31, 1868, created a trust in the land which John F. Costelo could enforce in equity, and that whether the relations of the parties were such as to constitute them copartners or not, John F. Costelo was entitled to an account in equity of the amount due him under this agreement after the land had been sold, and that, as, until the land was sold and this account taken, it could not certainly be known how much, if anything, of the proceeds of the enterprise would be due to him,

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an action at law for his share of these proceeds could not, under the facts in evidence, be maintained.

It may also be assumed that, although the instrument declared on is in form a promissory note, yet, as it was given as collateral security for the fulfilment of the agreement, and a memorandum to that effect appears upon its face, no action at law can be maintained upon it unless such an action could be maintained upon the agreement itself if the contents of this note had been inserted in the agreement. *Costelo* v. *Crowell*, 127 Mass. 293. If the agreement has been fully performed, no action can be maintained on the note, but it should be surrendered to the defendant; if the agreement has not been fully performed, yet, if the damages to be recovered on the note can only be ascertained after the land has been sold and an account taken, no action at law can be maintained on the note until these things have been done. The note is called collateral security for the fulfilment of the agreement, but it is simply a promise by Corey additional to his covenants in the agreement, and collateral to them. If it were the note of another person, there would be no doubt of the right of the plaintiff to collect it, and to hold the proceeds as security for the performance of the agreement. But if a debtor gives a creditor two or more separate obligations of his own to pay the same debt, the creditor does not acquire the right of collecting of the debtor on any or all of these obligations more than what is really due to him. *Ex parte Farnsworth*, 1 Lowell, 497. *Third National Bank* v. *Eastern Railroad*, 122 Mass. 240.

The case of *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 100 Mass. 444, if it be regarded as correctly decided, is only apparently an exception. That case rests upon the ground that the obligations were under seal, and goes only to the extent of deciding that the plaintiff might take judgment for the amount of bonds held as collateral, as well as of the bonds owned by the plaintiff, and not that the plaintiff might collect and retain the full amount of the judgment.

In the case at bar, the two instruments were executed by Corey at the same time and as a part of the same transaction, and each refers to the other, and, for the purpose of determining the intention of the parties as expressed in the two instruments,

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they are to be construed in reference to each other. If it appears from such a construction that it was the intention of the parties that Corey should pay to Costelo $3000, with interest in five years from date, absolutely, even if the land had not then been sold, or if sold, even if Costelo's share of the proceeds did not amount to this sum, and that Costelo should receive this sum to his own use absolutely, without any liability on his part to contribute therefrom, under any circumstances, toward the payment of any losses, there is no reason why an action at law on the promise contained in the note should not be maintained.

The cases which most nearly resemble this, and which illustrate the most favorable view for the defendant which can be taken, are cases in which one partner has maintained an action at law against his copartner on a promise to pay money contained in the agreement of copartnership, and relating to the partnership business, without taking an account between the partners of the affairs of the partnership. The principles which govern such cases were considered in *Ryder* v. *Wilcox*, 103 Mass. 24, 29. In the opinion the court say: "It is said that an action at law for damages for the breach of an express agreement, entered into by one partner in favor of another, will only lie where the action can be properly tried without going into the partnership accounts, and the damages sought will belong exclusively to the plaintiff, and where the plaintiff will not be liable in any contingency, affecting the future joint business, to contribute to his own payment. Lindley on Part. 731, 740. But, without stopping to inquire whether this action can be maintained without violating these rules, it is sufficient to say that, whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff."

In *Williams* v. *Henshaw*, 11 Pick. 79, 84, which was *assumpsit* between copartners, the court say: "If the plaintiffs had shown an agreement on the part of the defendants to advance one half of the money necessary to carry on their joint speculation, or a promise to repay the plaintiffs for their advances, they might well recover upon such undertaking in the present action." See also *Remington* v. *Allen*, 109 Mass. 47; *Capen* v. *Barrows*, 1 Gray,

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376; *Brown* v. *Tapscott*, 6 M. & W. 119; *Paine* v. *Thacher*, 25 Wend. 450; *Whitehill* v. *Shickle*, 43 Mo. 537; *Collamer* v. *Foster*, 26 Vt. 754; *Wills* v. *Simmonds*, 8 Hun, 189; *Lomas* v. *Bradshaw*, 9 C. B. 620; *Venning* v. *Leckie*, 13 East, 7; *Gilpin* v. *Enderby*, 5 B. & Ald. 954.

It appears by the agreement that Costelo advanced to Corey $3000, which was used by him in the purchase of the land, and that Corey gave the grantor his note for $9000, with interest at six per cent, secured by a mortgage on the land, as the remainder of the consideration of the purchase; that Corey agreed to save Costelo harmless from all losses which might occur "in the decrease or sale of said buildings or lands;" that he also agreed "to pay the $3000 advanced by the said Costelo towards the purchase and first payment of said buildings and lands;" and agreed to pay $3000 on the mortgage in one year, and "the balance of said mortgage, six thousand dollars," with interest, in five years; that Corey was to have full control of the buildings and lands, was to pay the interest on the mortgage, all taxes and assessments and the insurance, out of the rents and crops; that the lands and buildings were to be sold for the joint benefit of the two parties, and the proceeds to be divided equally after paying off the mortgage; and that Corey has given to Costelo his note for $3000, with interest at six per cent, "as collateral security for the said three thousand dollars paid by the said Costelo to the said Corey, and for the fulfilment of this agreement." This agreement plainly contemplates that the mortgage would not be fully paid until five years from date, and that the lands might not be sold and the interest of each party in the proceeds determined until after five years. As Corey held the legal title to the lands, and by the agreement had full control over them, it was in his power to sell them or to defer selling them, as he pleased, except as he might be controlled by a court of equity. If he sold them before the expiration of the five years and paid over to Costelo his share of the proceeds, and this share amounted to at least $3000 and interest, Corey would be entitled to a surrender of the note, because he had paid it and wholly performed his agreement. If at the expiration of five years this had not been done, we think it was the intention of the parties that Corey should pay to Costelo absolutely

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the $3000 and interest, and that Corey personally assumed this obligation without regard to the ultimate result of the enterprise; and that, if Costelo received this sum, he was not bound to contribute towards any losses, if any such were found to have been sustained on the final adjustment of accounts. If this is the obligation which Corey assumed, an action at law on his promise in writing to that effect is the appropriate remedy for enforcing it.

For these reasons, a majority of the court are of the opinion that the *Exceptions must be sustained.*

WILLIAM L. FRENCH & others *vs.* STAR UNION TRANSPORTATION COMPANY.

Suffolk. Jan. 29. — Feb. 10, 1883. FIELD & W. ALLEN, JJ., absent.

A common carrier is not liable in trover to the consignor, for surrendering the possession of goods, entrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee.

A common carrier, who surrenders the possession of goods, entrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee, is not liable to an action by the consignor, after notice by him to hold the goods, for not notifying the officer or taking steps to stop the goods *in transitu*.

TORT. The first count alleged that the plaintiffs, on April 6, 1881, delivered to the defendant, a transportation company carrying goods for hire, three cases of shoes, to be carried from Boston to Covington, Kentucky; and that the defendant, before delivering said cases to the consignees, converted the same to its own use. The second count alleged the delivery to the defendant, as in the first count, and further alleged that the plaintiffs, having learned of the insolvency of the consignees, notified the defendant, on May 4, 1881, and before the cases of shoes came into the possession of the consignees, not to deliver them; but the defendant neglected to hold them for the plaintiffs, and delivered them to the consignees, whereby the plaintiffs lost their lien. Answer: 1. A general denial. 2. That the cases

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were attached as the property of the consignees, after their arrival and before the defendant was notified not to deliver them, and were taken from the possession of the defendant.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts, in substance as follows:

The plaintiffs are copartners residing in Haverhill, Massachusetts. The defendant is a common carrier between Boston, Massachusetts, and other places, including Cincinnati, Ohio. On April 26, 1881, the plaintiffs delivered to the defendant at Boston certain goods sold, marked and consigned to Sayers Brothers, Covington, Kentucky, for transportation to Cincinnati, Ohio. Cincinnati and Covington are situated on opposite shores of the Ohio River, and goods consigned to Covington are transported by the defendant to Cincinnati, and no farther, and are there delivered to the consignees. The defendant transported said goods to Cincinnati, where in due course they arrived on May 2, 1881, and were placed in the defendant's warehouse ready for delivery to the consignees, and on the next day, May 3, at 10 A. M., they were attached as the property of the consignees, by a duly qualified officer, upon and by virtue of a writ issued by a court of competent jurisdiction, in favor of certain creditors of said consignees, and were taken away by the officer from the possession of said defendant, and were retained by him until May 7, 1881, when the last-mentioned suit was settled, and the goods were delivered up to the consignees by the officer. The freight charges on the goods were paid by the officer to the defendant at the time of the attachment.

On May 4, 1881, a message was telegraphed from Haverhill to the defendant's agent at Boston, directing him to hold the goods delivered on April 26, which message was received at the agent's office, in his absence, at 3 P. M., and by said agent at about 4 P. M., who forwarded the message in the cars to the defendant's agent at New York, who in turn forwarded the message to the defendant's agent at Pittsburg, Pennsylvania, and it reached him on May 6, 1881.

It was also agreed that the pleadings were sufficient to raise the questions of law presented by the foregoing facts, and that if, upon said facts, the plaintiffs were entitled to recover, they

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should have judgment for $154.80, with interest from the date of the writ; otherwise, judgment for the defendant.

T. B. King, for the plaintiffs.

W. S. Stearns, for the defendant.

MORTON, C. J. We see no principle upon which the plaintiffs can maintain this or any action upon the facts agreed. The defendant received the goods of the plaintiffs, and by its bill of lading agreed to transport them to Cincinnati and to deliver them to the consignees. It did transport the goods safely to Cincinnati, where they arrived on May 2, 1881, and were placed in the defendant's warehouse ready for delivery. On the next day, May 3, they were attached as the property of the consignees in a suit against them, by an officer, who took possession of them and retained them until May 7, when, the suit having been settled, he delivered them to the consignees. The defendant is not liable on its contract of carriage, because it has performed it. It is not liable in trover for the conversion of the goods, because the surrender of the possession to an officer, attaching them upon legal process against the consignees, was not tortious on the part of the carrier, so as to make it liable for converting them to its own use. *Stiles* v. *Davis*, 1 Black, 101. *Edwards* v. *White Line Transit Co.* 104 Mass. 159.

The plaintiffs contend that the defendant is liable, under the second count of the declaration, for negligence in permitting the attaching officer to deliver the goods to the consignees. It appears that, on May 4, some one on behalf of the plaintiffs telegraphed to the defendant's agent in Boston to hold the goods. This was after the goods had been taken from the defendant by the attaching officer. The plaintiffs' argument is, that, upon receiving this message, it was the duty of the defendant to telegraph to its agent in Cincinnati, and to notify the officer, and thus, on behalf of the plaintiffs, stop the goods *in transitu*. It does not distinctly appear that the plaintiffs had any right of stoppage *in transitu;* but, if we assume that they had, and also assume that they might exercise this right while the goods were in the hands of the officer, they had no right to impose upon the defendant, without its consent, the active duty of notifying the officer, or of taking any other steps to stop the

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goods *in transitu*. If the plaintiffs lost anything, it was from their own want of diligence in taking the proper steps to assert their right of stoppage *in transitu*, and not from the neglect of the defendant to perform any duty it owed to the plaintiffs.

Judgment for the defendant affirmed.

CHARLES B. WILSON *vs.* FREDERICK E. C. BRYANT.
SAME *vs.* SAME.

Suffolk. March 10, 11, 1881; Nov. 21, 1882. — Feb. 17, 1883. DEVENS & HOLMES, JJ., absent.

The owner of a parcel of land mortgaged it, subsequently conveyed his equity of redemption, and several years afterwards went into insolvency. The mortgagee sold the land under a power of sale contained in his mortgage, without obtaining any order of the insolvency court, and applied the proceeds in part satisfaction of his debt. *Held*, that he was entitled to prove the balance of his claim against the estate of the insolvent; and that the Gen. Sts. *c.* 118, § 27, did not apply.

A., owning land subject to a mortgage, conveyed his equity to B., who agreed with A. to assume and pay the mortgage. On the mortgage becoming due, neither A. nor B. paid the same. The mortgagee subsequently indorsed the note secured by the mortgage in blank, without recourse, and delivered it to the wife of A., who paid for it out of her separate estate, and the mortgagee at the same time assigned the mortgage to her. B. afterwards became insolvent. *Held*, that A. could not prove, against B.'s estate in insolvency, a claim for the amount remaining unpaid on the mortgage.

TWO APPEALS from decrees of the Court of Insolvency, allowing claims of the plaintiff against the estate of Henry B. Williams, an insolvent debtor, of which the defendant was assignee in insolvency. The cases were submitted to the Superior Court upon the following statement of facts:

Before and on May 1, 1872, Charles B. Wilson, the plaintiff, was the owner of a parcel of land in Boston, subject to a mortgage made by him, on April 29, 1871, to Charles Amory and others, trustees, to secure the payment of his note to them for $20,000, in three years, with interest. On May 1, 1872, Wilson, in consideration of $45,000, conveyed by deed of warranty to Williams one undivided half of this land "subject to a mortgage

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from me to said Amory and others for the sum of $20,000," dated April 29, 1871, "one half of which mortgage debt the said Williams assumes and promises to pay, the same forming part of the above consideration." And, on the same day, Williams, as part of the consideration, conveyed to Wilson other land valued at $20,000, and made to Wilson his note for $15,000 payable April 1, 1874, and, to secure the payment of this note, executed a mortgage back to Wilson of the premises conveyed by the latter to him, describing them as subject to a first mortgage of $20,000, dated April 29, 1871, to Amory and others, and with the usual covenants, except against that mortgage, and containing a power of sale.

On August 15, 1873, Williams sold and conveyed by deed of quitclaim to Samuel T. Crosby the same premises, subject to the two mortgages, but without the grantee otherwise agreeing to assume and pay them, and Williams has since acquired no new title to the premises. One half the interest on the first mortgage was paid by Williams until his conveyance to Crosby, and by Crosby, afterwards, to November 1, 1875, and no payments of interest have been made since.

On April 29, 1874, Wilson's note to Amory and others became payable, but no part of it was paid, and on May 25, 1874, they indorsed it in blank, without recourse, and delivered it to Sarah D. Wilson, his wife, who paid for it out of her separate estate, and they at the same time assigned to her the mortgage from her husband to them.

On May 24, 1877, a portion of the land, described by metes and bounds, was conveyed to one Kent, by Crosby as owner of one undivided half, by one Wallis who had acquired one undivided fourth by a conveyance from Wilson, and by Wilson as owner of the other undivided fourth; Wilson as owner of the second mortgage releasing it therefrom, and his wife as owner of the first mortgage releasing it from that incumbrance; and all of the purchase money, after payment of taxes and expenses, namely, $8836.54, was credited upon the first mortgage note.

On February 1, 1879, Williams filed a petition in insolvency, upon which the defendant was duly chosen assignee; and all the estate of Williams was duly assigned to him, according to the statute.

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In April 1879, the plaintiff, having been duly notified, and having actual knowledge of the proceedings in insolvency, advertised for sale the undivided half mortgaged to him, according to the power of sale contained in his mortgage, and the sale, after having been once adjourned, was again adjourned until June 11, 1879, on which day the premises were bid in by James H. Young for $500, and Young at the same time conveyed the same to the plaintiff, who now owns the same subject to the first mortgage. No application was made to the Court of Insolvency to authorize that sale, and no notice of the sale was sent to the assignee in insolvency; but, in May 1879, he learned from a conversation with Wilson's attorney that the sale had been once adjourned and would be again adjourned to some future day. No question is made of the regularity of the sale as a sale under the power contained in the mortgage; but the assignee offers to prove, if material, that the value of the premises was at the time of the sale, and is now, more than $500.

On March 19, 1880, Wilson presented for proof against the estate of Williams two claims. 1st. For the amount due on the note secured by the second mortgage, less the amount obtained at the sale under the power therein contained. 2d. For half the amount remaining unpaid on the first mortgage. It was agreed, as to each claim, that, if on these facts the plaintiff had a right to prove it against the estate of Williams, and no defence was disclosed which could be set up by the assignee, judgment should be entered for a sum agreed; otherwise, for the defendant.

Upon the first claim the Superior Court gave judgment for the plaintiff, and the defendant appealed. Upon the second claim that court gave judgment for the defendant, and the plaintiff appealed.

The cases were argued together, in March 1881, by *E. W. Hutchins & J. H. Young*, for Wilson, and by *W. C. Loring*, for the assignee; and were reargued by the same counsel, in November 1882. The following separate opinions were filed in the cases.

C. ALLEN, J. The purchaser of an equity of redemption of land mortgaged it to his vendor to secure a part of the purchase money, and then conveyed his interest in the land to a stranger;

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and several years afterwards went into insolvency. The mortgagee, without any order of court, but under a power of sale contained in the mortgage, made sale of the mortgaged premises for less than the amount of the mortgage debt, and applied the proceeds in part satisfaction thereof, and offered to prove the balance against the estate of the debtor in insolvency. The question is whether he can be allowed to make such proof. The determination of this question depends on the just construction of the Gen. Sts. *c.* 118, §§ 25, 27. By § 25, general provision is made for the proof of all debts which are absolutely due. By § 27, an exception is made, where a creditor has a mortgage or pledge of real or personal estate of the debtor, and special provisions are made regulating the proceedings in such case.*

We have recently held, in *Smith* v. *Warner*, 133 Mass. 71, that a creditor holding a mortgage of real estate of the debtor, who made a sale of the mortgaged property with the concurrence of the assignee, but without an order of court, could not be allowed to prove the balance of his debt. In that case, the creditor held two mortgages, and the equity of redemption was in the debtor at the time of his insolvency, and vested in the assignee. The question here is, whether the creditor in the present case was to be considered as having a mortgage of real estate "of the debtor." He originally received his mortgage from the debtor, but the debtor had parted with his equity of redemption five years and six months prior to the commencement of the proceedings in insolvency, and since that time had had no interest in the land.

* This section is as follows: "When a creditor has a mortgage or pledge of real or personal estate of the debtor, or a lien thereon, for securing the payment of a debt claimed by him, the property so held as security shall, if he requires it, be sold, and the proceeds applied towards the payment of his debt, and he shall be admitted as a creditor for the residue. The sale shall be made in such manner as the judge orders, and the creditor and assignee respectively shall execute all deeds and papers necessary or proper for effecting the conveyance. If the creditor does not require such sale and join in effecting the conveyance, he may release and deliver up to the assignee the premises held as security and be admitted as a creditor for the whole of his debt. If the property is not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

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Upon a full consideration of this question, and aided by the elaborate discussion at the bar in this and other recent cases, and after a somewhat full examination of the authorities in this State and elsewhere, a majority of the court have come to the conclusion that § 27 was not designed to prevent the proof of a claim in circumstances like the present.

In the first place, there is a difficulty in complying with the requirement for a sale of the property, under an order of the judge. The equity of redemption is held by a stranger, who is not subject to the jurisdiction of the court. The provision is that "the property" shall be sold. This can be done where the equity of redemption is owned by the assignee, as succeeding to the rights of the debtor; but it cannot be done where the equity is owned by a stranger, unless indeed the sale is limited to the interest in the property which is held by the creditor. But here, again, the practical difficulty is met, that in such case it would be necessary to make sale of the mortgage, without including the debt secured thereby. The creditor is to retain his debt, and make proof thereof, after applying the proceeds of the sale. There is a difficulty in separating the debt from the security in such a case, which apparently the statute was not intended to deal with.

In the next place, it is provided that "the creditor and assignee respectively" shall execute all deeds and papers necessary or proper for effecting the conveyance. This seems to assume that deeds and papers executed by the creditor and assignee will be sufficient to effect the conveyance. These parties are within the control of the court, and subject to its order. But, in a case like the present, their deed will not effect a conveyance of the property. It is further provided that, if the creditor does not require such sale, he may release and deliver up to the assignee the premises held as security, and be admitted as a creditor for the whole of the debt. This again contemplates that, by such release and delivery, the assignee will acquire a full title to the property; it does not contemplate that the creditor shall merely assign a mortgage, which is to be kept up as an independent security, while he himself retains and proves the debt secured thereby. Unless one of the foregoing methods is adopted, the statute provides that the creditor, if he falls within the class

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contemplated by the statute, shall not be allowed to prove any part of his debt. There is no provision for any valuation of his security, but the prohibition of the statute is explicit. If, therefore, the conditions of the statute cannot be complied with, in any particular case, that is a reason for believing that the statute was not intended to include such case.

No one of the numerous decisions to which our attention has been called * rests upon facts exactly like those now before us; that is to say, there is no case where the debtor has given security by way of mortgage, and then, at a considerable period before the commencement of the proceedings in insolvency or bankruptcy, has conveyed away his equity of redemption to a stranger. But in numerous cases under the corresponding sections of the United States bankrupt act, U. S. Rev. Sts. § 5075,† and of the English bankrupt act, St. 32 & 33 Vict. *c.* 71, § 40,‡ where the language is somewhat more specific, to be sure, a creditor who has held security originally furnished by a third person has been allowed to prove his debt, even without accounting for the value of the security. Certain of the reasons above given have also been recognized as of weight in former decisions of this court. *Richardson* v. *Wyman*, 4 Gray, 553. *Sanger* v. *Bancroft*, 12 Gray, 365. *Hunnewell* v. *Goodrich*, 3 Cush. 469. *Cabot Bank* v. *Bodman*, 11 Gray, 134. It is not, however, to be overlooked, that our present construction of the statute may not be thought to be altogether consistent with the decisions in *Lanckton* v. *Wolcott*, 6 Met. 305, and *Richardson* v. *Wyman*, above cited.

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* The counsel for the assignee cited, on this point, *In re Plummer*, 1 Phil. 56; *Kellock's case*, L. R. 3 Ch. 769; *Mason* v. *Bogg*, 2 Myl. & C. 443, 446, 448; *Ex parte Geller*, 2 Madd. 262; *Ex parte Rolfe*, 3 Mont. & Ayr. 305; *In re Babcock*, 3 Story, 393, 399; *In re Holbrook*, 2 Lowell, 259; *In re Cram*, 1 N. B. R. 504.

† See *In re Babcock*, 3 Story, 393; *In re Alexander*, 1 Lowell, 470; *In re Holbrook*, 2 Lowell, 259; *In re Cram*, 1 N. B. R. 504; *In re Dunkerson*, 4 Biss. 253, 259; *In re Anderson*, 12 N. B. R. 502; *In re Broich*, 15 N. B. R. 11, 14.

‡ See *Ex parte Parr*, 1 Rose, 76; *Ex parte Shepherd*, 2 Mont. D. & DeG. 204; *Ex parte Bowden*, 1 Deac. & Ch. 135; *Ex parte Peacock*, 2 Glyn & J. 27; *Ex parte Goodman*, 3 Madd. 373; *Ex parte English & American Bank*, L. R. 4 Ch. 49; *Ex parte Hedderly*, 2 Mont. D. & DeG. 487; *Ex parte Groom*, 3 Mont. & Ayr. 157, 164.

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In *Lanckton* v. *Wolcott*, a creditor who had received as security a mortgage from the principal debtor, which was worth four fifths of the amount of his debt, was required to deduct the value of the mortgage before making proof against the insolvent estate of a surety. If the mortgage security had been equal in value to the whole amount of the debt, it is plain, on familiar principles of subrogation, that, in case of proof by the creditor of his debt, the assignee in insolvency would be entitled to avail himself, to some extent, of the security; otherwise, the security given directly by the principal debtor would be exonerated to the amount paid from the insolvent estate by way of dividends. It is no doubt ordinarily true that a creditor may in the first instance compel a surety to pay the whole debt. *Crocker* v. *Gilbert*, 9 Cush. 131. *Allen* v. *Woodard*, 125 Mass. 400. But, upon such payment, the surety's right to subrogation is clear; and, if the creditor does any act to impair the value of that equity, he, to that extent, loses his claim against the surety. *Baker* v. *Briggs*, 8 Pick. 122. *Guild* v. *Butler*, 127 Mass. 386. Where the surety's estate is to be administered in insolvency, it may be proper to require these equities to be adjusted in the first instance, if it appears that the value of the security, when added to the probable dividends, will exceed the debt; and in such case this may be a sufficient reason for applying a rule of equity, outside of that furnished by the statute itself, to restrain the proof of the claim. Without, however, pursuing the inquiry further, at this time, it is sufficient to say that there are no such equitable considerations in the present case as to bring it directly within the authority of *Lanckton* v. *Wolcott*.

In *Richardson* v. *Wyman*, the creditor held a mortgage from three tenants in common, one of whom was in insolvency. It was recognized that it was impossible for the creditor to make sale of his whole security under an order of court, or to surrender it to the assignees; but it was held that the value of the whole security should be ascertained and deducted, before proof of the claim should be made. This rule was considered to be within the spirit, if not within the letter, of the statute. That decision is not a strict precedent governing the present case, because here the creditor has made sale of the mortgaged premises under the power of sale, and applied the proceeds, and so,

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even under that decision, he might well be allowed to make the proof which he seeks to make. The grounds of the present decision are different, but it is not necessary to say whether they would lead to a different result, under a state of facts precisely like those there presented.

It has been strongly urged upon us that the creditor's security, in the case before us, was originally given by the insolvent debtor, and diminished his general assets, and therefore ought to be deducted before proof of the debt is allowed. There are two answers to this. In the first place, it is not an argument which is founded directly upon the language of the statute, and therefore of controlling force, independently of equitable considerations; but it rests merely upon equitable considerations, and is well answered if it is found on the whole that they do not exist. In this case, the creditor has in fact made a sale of the mortgaged premises, under the power of sale, and appropriated the proceeds upon his debt, so that he only seeks to prove for the surplus. It is indeed said that the full value of the premises was not realized at the sale; but, on the other hand, it appears that the creditor exercised good faith, and got the most that he could. The sale was repeatedly adjourned; the assignee had knowledge enough to put him on inquiry at least; and there is no reason to suppose that the creditor was careless or negligent in the execution of his trust.

But, in the second place, we do not think it can in any just sense be said that the debtor's general assets were diminished by the giving of this security. If, at the time of his insolvency, he owned the land, subject to the mortgage, then it would be true that his general assets would have been more, but for the existence of the incumbrance. But, inasmuch as the equity is owned by a stranger, the existence of the mortgage does not diminish any assets to which creditors could resort. There is no evidence and no presumption that the debtor diminished his general assets by the conveyance of the equity. He must, in the absence of anything to the contrary, be presumed to have received its equivalent in money or other property. Nor can we see that he diminished his general assets by the fact of giving the mortgage in the first place. This was not given for the purpose of securing any preëxisting debt, and so of withdrawing

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a portion of his general assets, and devoting it to the security of a particular creditor; but it was given to secure a part of the purchase money of the property. There is nothing to show, and there is no presumption, that he could have purchased the property on other terms than he did, and especially that he could have done so without securing this portion of the purchase money. Giving security for the purchase money of property is no more a diminution of the assets of the purchaser, than paying in cash would have been. It is true that, after the purchase, he may be said to have less assets than he would have had if he could have bought the land on credit, without giving any security; because in that case the assets of the vendor would have been added to his own. But we are not to assume that this could have been done.

On the whole, therefore, we are of opinion that the creditor is entitled to prove the balance of his claim.

Judgment accordingly.

C. ALLEN, J. The distinction between an agreement or covenant of indemnity against a mortgage or other incumbrance, and an agreement to assume and pay the debt of another which is secured by mortgage, has been recognized and defined in recent cases. *Locke* v. *Homer*, 131 Mass. 93. *Furnas* v. *Durgin*, 119 Mass. 500, 506. In the former case, no recovery can be had until the obligee has been actually damnified. In the latter case, it has been held that, as soon as there is a breach of the contract, he may recover the full amount agreed to be paid.

In the present case, Wilson seeks to prove a claim against the estate of Williams, the insolvent debtor, which is founded upon the provision in the deed from Wilson to Williams, by which the latter assumed and promised to pay one half of the debt of Wilson, secured by a mortgage theretofore given by Wilson to Amory and others. If this could be treated as a mere contract or promise of indemnity, no claim is provable, and no recovery of substantial damages could be had in an action at law, because as yet Wilson has not been damnified. The fact, if it exists, that Wilson's property is subject to a mortgage, is not sufficient, because the right to recover, or to prove a claim, depends upon

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the establishing of a promise to pay his debt, and not merely of a promise to clear his property from an incumbrance. It is therefore essential for Wilson to prove that he is liable to pay a debt, which is enforceable against him, in order to enable him to recover damages or prove a claim in insolvency. He could recover as damages, or prove in insolvency, only the amount of his debt, which he is bound to pay, and which the other party promised to assume and pay for him.

The mortgage which the debtor agreed to assume and pay was transferred to Wilson's wife, and the mortgage note was indorsed in blank by the original mortgagees and delivered to her. It has been held, and must be considered as now established, that a married woman cannot enforce a note held by her against her husband. *Roby* v. *Phelon*, 118 Mass. 541. As a promise to pay, the note is no longer valid. The fact that it was originally made to another person will not enable her to enforce it against her husband, either at law or in equity, as a personal obligation. He therefore no longer has a right of action against the debtor, or a claim provable against his estate in insolvency, upon the promise to pay that debt. For this reason, the proof of the claim should be expunged, and the claim disallowed.

Judgment accordingly.

DANIEL S. PRATT *vs.* BOSTON HEEL AND LEATHER COMPANY.

Suffolk. Jan. 29. — Feb. 27, 1883. FIELD & W. ALLEN, JJ., absent.

A bailee brought an action of tort for the conversion of goods. His bailor subsequently brought an action of replevin and obtained possession of the goods. In the replevin suit a finding was made for the defendant, for want of a demand before bringing the action, and the case was continued to await the determination of the action in tort. *Held*, that these facts showed no ground of defence to the recovery of full damages by the plaintiff in the action of tort.

At a new trial, granted upon motion of the defendant, in an action for the conversion of goods, on the issue of the value of the goods alone, no other question than their value is open to the defendant.

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TORT for the conversion of fifteen bags of wool. Trial in the Superior Court, without a jury, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

There are two actions relating to the same property brought against this defendant. This was the first, and was brought on May 25, 1881. The second was an action of replevin, brought by George F. Moore on June 2, 1881. Moore owned the fifteen bags of wool in question, and placed them in the hands of this plaintiff as his bailee; and the plaintiff kept it in a building belonging to the defendant.

This action was brought to recover the value of the wool, on January 15, 1881, by reason of an alleged wrongful holding of the wool, and the wool was attached by order of the plaintiff as security for the judgment which might be recovered.

The defendant afterwards dissolved the attachment by giving a bond, and took the wool into its possession again; and Moore, by his action, replevied the wool on June 2, 1881, and still holds the same. Both actions were tried at October term 1881 of the Superior Court. This action was tried first by order of the court, and resulted in favor of the plaintiff; and it was found that the wool was worth forty-seven cents a pound on January 15, 1881. The replevin suit was then tried, and the court found for the defendant, solely on the ground that Moore had made no demand on the defendant for the wool before bringing his action; and that action was continued *nisi* by the court, to await the determination of this action, no order of return having been made. Upon the defendant's motion, and after hearing, a new trial was granted "on the issue of the value of the wool alone."

The case came on to be heard anew under said order at January term 1882; and the defendant objected to the admission of any testimony as to the value of the wool, on the ground that Moore, the owner, had replevied the wool, and still held it. The judge ruled that, under the order for a new trial, no questions were open to the defendant except such as were incidental to a determination of the value of the wool; and admitted the evidence.

The defendant asked the judge to rule that, although this plaintiff might have been justified in bringing his action on May

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25, 1881, when Moore, on June 2, 1881, brought his action of replevin, the bailment was thereupon wholly terminated, and this plaintiff thereafter had no right to the immediate possession of the wool, nor interest in it; that no evidence ought to be admitted as to the value of the wool at the time of the alleged wrongful holding, and the plaintiff was entitled to only nominal damages; and that, if Moore was present and counselled with the plaintiff in bringing this action, it would still be a termination of the plaintiff's bailment when Moore brought his action of replevin.

The judge refused to rule as requested, but found as facts from the evidence, that, soon after this action was brought, and before the bringing of the replevin suit, Moore was informed of what had been done, and approved of it; that this action has been prosecuted ever since with his approval, and with the expectation on his part of availing himself of whatever benefits might be derived from it; and that he brought the replevin suit with the view of obtaining an additional remedy; and found the value of the wool on January 15, 1881, to be forty cents a pound, and modified the assessment of damages in the case accordingly; and ordered judgment for the plaintiff thereon. The defendant alleged exceptions.

D. B. Gove, for the defendant.

C. E. Washburn, for the plaintiff.

C. ALLEN, J. Since Moore did not prevail in his action of replevin, but was defeated therein, and since the defendant has not now and never had any authority from Moore to retain possession of the goods, it is difficult to see any ground of defence to this action growing out of Moore's relation to the property. *Harrington* v. *King*, 121 Mass. 269. 2 Kent Com. 566, and note. But the new trial was granted on the issue of the value of the wool alone; and no other question was open to the defendant. *Seccomb* v. *Provincial Ins. Co.* 4 Allen, 152. On both grounds, therefore, the entry must be *Exceptions overruled.*

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JAMES W. TEAGUE *vs.* SAMUEL G. IRWIN.

Suffolk. Jan. 9, 10. — Feb. 28, 1883. FIELD & W. ALLEN, JJ., absent.

A count in tort for deceit in the sale of stock may be joined with a count in contract to recover back the price paid.

At the trial of an action for deceit in the sale of the stock of a corporation, the defendant called as a witness the treasurer of the corporation, who produced his cash-book, and testified that he showed it to the plaintiff before he bought his stock of the defendant. *Held*, that it was competent for the plaintiff to cross-examine the witness as to the manner of keeping this book, and to show that it was not fairly kept, and did not contain a correct statement of the affairs of the corporation.

No exception lies to the admission of evidence to rebut immaterial evidence.

If a bill of exceptions states that the defendant introduced evidence of a conversation between the plaintiff and a third person in a certain month, and that, in reply, the plaintiff testified to a conversation with this third person in the same month and relating to the same subject matter, the defendant shows no ground of exception, although the bill of exceptions does not distinctly state that the plaintiff's testimony related to the same conversation, and it would otherwise be immaterial.

TORT, with a count in contract, both counts being alleged to be for the same cause of action. The count in tort alleged that the plaintiff was induced to purchase of the defendant ten shares of the capital stock of the Boston, Winthrop and Point Shirley Railroad Company, by false and fraudulent representations of the defendant that the company was solvent, that the capital stock was all paid in, and that the company then had money enough in its treasury to pay all the expenses of building and equipping its road. The count in contract was for money had and received. Answer, a general denial. After the former decision, reported 127 Mass. 217, the case was tried in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered evidence tending to show that the representations set forth in the declaration were made by the defendant in the months of November and December 1876; that afterwards, on December 19, the plaintiff paid for five shares (at the rate of one hundred dollars per share), taking a certificate in his own name; and that on March 31, 1877, he paid for the other five shares, taking a certificate in the name of his wife. He also offered evidence tending to prove that, at the

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time the representations were made, the capital stock of said company was not all paid in; that the company had not enough money in its treasury to build and equip its road; that it had substantially no money in its treasury; and that its stock had no market value, and could not be sold.

The defendant, who was examined as a witness in his own behalf, denied making any of the representations alleged, and denied that the stock was purchased of him; and he contended, and offered evidence tending to show, that it was purchased of the company. He admitted that it was not true that the capital stock had all been paid in, and that the company had money enough to build and equip its road. But he contended that, if he represented the road to be solvent, such representation was true in every respect, and that, at the time of said alleged representations, said company was able to pay all its debts. On cross-examination, he testified that from November or December 1876, to April 1877, the road-bed was frozen, and that nothing was done towards building or completing the road, and there was no material change in the affairs of the company during that time.

The plaintiff offered evidence tending to show that, after notice to the defendant, he caused his ten shares of stock to be sold by public auction in Boston, on July 21, 1877, before this suit was brought, and that it was sold for $5 per share. This evidence was objected to, and the judge ruled that it was incompetent for the purpose of proving the value of the stock when the representations were made, and that its value in the July following was immaterial. The plaintiff then offered evidence tending to prove that, before this sale, he tendered the stock back to the defendant, and demanded the money, and again offered this evidence of the auction sale, under the second count of his declaration, claiming to recover back the money paid (less what he received for the stock) as upon a rescission of the contract. The defendant thereupon contended, and requested the judge to rule, that the count in tort for deceit, and the count in contract, based upon an alleged rescission of the contract, could not be said to be for the same cause of action, and could not stand together. The judge refused so to rule, no demurrer having been filed, and admitted the above-recited evidence of

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the auction sale, under the objection and exception of the defendant.

The defendant contended, and offered evidence tending to show, that the exact pecuniary condition of the company was stated, and shown to the plaintiff, before he took any of the stock, or paid any money; and one Hills, the treasurer of the company, testified that, at one of his early interviews with the plaintiff, in November 1876, he showed him the journal or cash-book of the company, by which it appeared that at that time he had received in cash, from subscriptions to stock, about $8830, and no more, and had paid out for construction about $8815, and that there was then in the treasury a sum not exceeding $15. This book was produced by Hills at the trial, who pointed out to the judge and jury the items above referred to, which he said he showed to the plaintiff. Upon examination of this journal or cash-book, it appeared that the sum of $3300 had been paid to one Barker for ties. Upon the cross-examination of Hills, the plaintiff was allowed, against the objection and under the exception of the defendant, to show that when the company assumed this bill for ties, and agreed to pay it, (the ties having been previously purchased by some one professing to act for the company, and never having been delivered,) it was agreed that Barker should take ten shares of stock in part payment of his bill, and that he did take ten shares of stock in this way, namely, by taking ten shares which had been assigned to one Parks, and paid for by Parks. And it appeared by the journal that the $1000 paid by Parks had been charged to the treasurer, and that the $3300 was credited to him as paid to Barker. This examination was permitted, upon the ground that it tended to show that the book said to have been shown to the plaintiff did not contain a correct statement of the company's affairs. The plaintiff had previously denied that the book was shown to him at all by Hills, and Hills testified that so much of the journal as showed the footings above mentioned, and no more, was shown to the plaintiff. The judge admitted this testimony.

The defendant called one Parks, the manager of the company, who testified, against the objection of the plaintiff, that, in July 1877, he discharged the plaintiff from the employ of the

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company, and informed him that he did so on account of many complaints of incompetency and failure of duty; and that the plaintiff then replied, that he knew that the defendant had been working against him since April, and had always been his enemy, but made no complaint in regard to stock transactions. He also testified as follows: "I discharged Teague some time in June 1877. I told him a great many complaints had been made; that he was a nervous man; that he had run away from his engine three times; that he had put a frog in the track wrong." On cross-examination, Parks testified: "I will not swear that, at the time I discharged Teague, he explained what I accused him of by telling me that the boiler of the engine foamed, because he had to use brackish water, and that he had to get off his engine to open a cock under the engine to let the water off."

In reply, the plaintiff testified that Parks did not discharge him, and was allowed to testify, against the defendant's objection, that in a conversation with Parks, in June 1877, he complained to him that he was obliged to run his engine with marsh water, because the company had not paid the city water tax; and that this water made his engine foam and work badly; and that, owing to the construction of his engine, he had to get off it in order to get at a cock to let the water off; and that Parks admitted to him that the company had not paid the city water tax.

The jury found for the plaintiff; and stated that they assessed damages by deducting the $50 received for the stock from the $1000 paid by the plaintiff, and adding interest. The defendant alleged exceptions.

S. B. Ives, Jr. & F. Dabney, for the defendant.

N. Morse, for the plaintiff.

MORTON, C. J. 1. The defendant objected to the admissibility of the evidence of the sale by auction of the stock in question, under the second count, solely upon the ground that the two counts of the declaration were improperly joined; and asked the court to rule "that the count in tort for deceit, and the count in contract, based upon an alleged rescission of the contract, could not be said to be for the same cause of action, and could not stand together." The court rightly refused this ruling.

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If a man is induced by false and fraudulent representations to buy goods of another, he may have the choice of two remedies. He may have an action of tort for the deceit, or, if he has taken the proper steps to rescind the contract, he may have an action of contract to recover back the price paid. Both these remedies proceed upon the ground of the fraud practised on him, and are not inconsistent or contradictory.

If the plaintiff is in doubt as to the legal effect of his evidence, he may, under our practice act, properly join in one action a count for the tort and a count in contract to recover the price. If there is any danger of confusion or injustice, the defendant should apply to the court, at the close of the evidence, to order the plaintiff to elect upon which count he will go to the jury, the court having the power in its discretion to make such order. Pub. Sts. *c.* 167, § 2. *Atwater* v. *Clancy*, 107 Mass. 369. *Mahon* v. *Blake*, 125 Mass. 477. *New Haven & Northampton Co.* v. *Campbell*, 128 Mass. 104.

2. The defendant introduced as a witness one Hills, the treasurer of the company, who produced his journal or cash-book, and testified that he showed it to the plaintiff before he bought his stock of the defendant. This was for the purpose of showing that the plaintiff was not deceived as to the condition of the company, as he claimed to be. It was clearly competent for the plaintiff to cross-examine Hills as to the manner of keeping this book, and to show that it was not fairly kept, and did not contain a correct statement of the affairs of the company. The cross-examination of Hills, which the defendant objected to, tended to show this, and was rightly permitted by the court.

3. The defendant called as a witness one Parks, the manager of the company, who testified that, in June 1877, he discharged the plaintiff from the employ of the company, and he detailed the conversation which then took place. In reply, the plaintiff testified that Parks did not discharge him; and was allowed, against the defendant's objection, to testify to a conversation between himself and Parks in June 1877. Even if Parks's testimony was immaterial, it was competent for the court to permit the plaintiff to give his version of the conversation to which it related. The bill of exceptions does not distinctly state that the plaintiff testified to the same conversation referred to

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in Parks's testimony; but it does not show or lead to the inference that it was a different conversation, and therefore does not show that the testimony of the plaintiff was improperly admitted. *Exceptions overruled.*

NATHANIEL C. SANGER *vs.* CITY OF NEWTON.

Middlesex. Jan. 16. — Feb. 10, 1883. FIELD & W. ALLEN, JJ., absent.

A petition to the Superior Court, for the assessment of damages for injury done to the petitioner's mill by the taking by the respondent of the waters of a stream, may be amended, under the Pub. Sts. c. 167, §§ 41, 42, 85, so as to enable the petitioner to maintain his action for the cause for which it was intended to be brought, although a new petition would be barred by the statute of limitations.

PETITION to the Superior Court, filed December 23, 1879, alleging that the petitioner was the owner of a certain mill in Watertown, with the privilege and right, as appurtenant thereto, to draw and use the waters of Charles River to run the mill; that within three years last past the respondent had taken the waters of said river, as authorized by chapter 125 of the Acts of 1874, by the construction of dams, galleries and other works; and that the petitioner had thereby suffered damages in his property and water rights, and the respondent had not agreed with him on the damages to be paid therefor; and prayed that an assessment of his damages might be ordered by the court, "as provided by said chapter."

At a hearing in the Superior Court, before *Bacon*, J., on February 27, 1882, before asking to have commissioners appointed, the petitioner moved to amend his petition by inserting, after the word "mill," the words "and has owned said mill and privilege for more than three years last past, and the same is bounded and described as follows:" (then followed the description;) also by inserting, after the words "Acts of 1874," the words and figures "chapter 344 of the Acts and Resolves of 1872, chapter 326 of the Acts and Resolves of 1873, and chapter 54 of the Acts and Resolves of 1876," also by adding the letter "s" to the word "chapter," at the end of the petition.

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The petitioner relied upon the statutes which he desired to insert by his amendments, and proposed to show that the St. of 1874 was inserted by mistake, and that he intended to apply under the other acts. The judge ruled, as matter of law, that he had no discretion in the matter of the amendments, and no power to allow the same; and, solely for that reason, denied the motion to amend. It appeared that the respondent had not acted under the St. of 1874, *c.* 125. The petitioner then moved for the appointment of commissioners on the petition as it stood without amendment; and asked the judge to rule that the words "chapter 125 of the Acts of 1874" might be treated as surplusage or matter of description. But the judge refused so to rule; ruled that the petition was insufficient, as matter of law, to justify the appointment of commissioners, or any further proceedings, and was so defective as to be incapable of amendment; and ordered it to be dismissed. The acts complained of were done so long ago that a new petition would be barred by the statutory limitation of three years. The petitioner alleged exceptions.

W. B. Durant, for the petitioner.

P. Thacher & W. S. Slocum, for the respondent.

MORTON, C. J. Our statutes of amendment are very broad, and authorize the courts to allow amendments in any matter, "either of form or substance, in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or the defendant to make a legal defence." Pub. Sts. *c.* 167, §§ 41, 42, 85. It has been held that, under these provisions, amendments may be allowed by county commissioners to a petition for a jury for the assessment of damages caused by laying out a highway. *Grand Junction Railroad & Depot Co.* v. *County Commissioners*, 14 Gray, 553. *Winchester* v. *County Commissioners*, 114 Mass. 481.

The petition in the case at bar is a proceeding in the nature of a civil action, analogous to a petition for the assessment of highway damages, and comes within the spirit of the statutes of amendments.

The fact that the three years within which an original petition could be filed have elapsed furnishes no ground for refusing

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the amendment, but rather a reason why it should be allowed, as otherwise substantial justice will be defeated. *George* v. *Reed*, 101 Mass. 378.

The Superior Court rejected the amendments proposed by the petitioner, on the ground that it had "no power to allow the same, and solely for that reason." We are of opinion that this was an error; and that the court has power to allow the amendments proposed, or any other amendments necessary to enable the petitioner to maintain his action for the cause for which it was intended to be brought. *Exceptions sustained.*

CALVIN HALE *vs.* JAMES T. JOSLIN & others.

Middlesex. Nov. 23, 1882. — Feb. 27, 1883. DEVENS & HOLMES, JJ., absent.

If a person executes a deed of land, and places it in the hands of A. with directions to keep it during the grantor's life and on his death to deliver it to the grantee, A. holds it as agent of the grantor, and not as agent of the grantee, and the grantor may revoke it at any time.

BILL IN EQUITY, filed November 29, 1880, alleging that, on August 7, 1873, Elijah Hale conveyed to the plaintiff by warranty deed a certain parcel of land in Stow, and on that day delivered the deed in trust to Edwin Whitney, one of the defendants, for the benefit and use of the plaintiff, as an escrow, and upon the express condition, and under the direction given by the grantor to Whitney, that, upon the grantor's decease, Whitney should forthwith deliver the deed to the plaintiff; that Whitney then received the deed in trust, as such an escrow, and upon said condition, and agreed with the grantor to comply with the direction so made and given by him; that Elijah Hale died on April 21, 1879, leaving a will, which, after the giving of certain specific legacies, devised the residue of his estate to his heirs at law, and appointed Joslin executor, with power to sell the real estate; that Joslin accepted the trust, and was duly appointed executor by the Probate Court; that, upon the death of Elijah Hale, Whitney refused to comply with said direction

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in regard to the delivery of the deed to the plaintiff, although often requested so to do; that Whitney had delivered over the deed to Joslin, without the consent and against the wishes of the plaintiff, and refused to obtain the same from Joslin for the plaintiff; and that Joslin, although often requested by the plaintiff, refused to deliver the deed to him, and claimed to hold it under and by virtue of his appointment as executor, and because, as he asserted, he had been notified by the heirs at law that they claimed the premises mentioned in the deed as belonging to the estate of Elijah Hale. The prayer of the bill was that Joslin might be restrained from selling the premises conveyed by said deed; and for further relief.

The answer of Whitney alleged the following facts: Whitney, at the request of Elijah Hale, wrote out and prepared the deed mentioned in the bill, on or about the day of its date, and, as a magistrate, took the grantor's acknowledgment thereof. The grantor then placed the deed in Whitney's hand, and said: "I want you to take it and keep it as long as I live. Say nothing to brother Calvin or anybody else about it, and when I am gone, give it to him." The deed was in Whitney's custody until Elijah Hale's death, and was seen by no other person. On April 24, 1874, Whitney, at the request of Elijah Hale, prepared a will, which was then signed and executed by him, in the first paragraph of which were these words, "hereby revoking all former writings for the purpose heretofore made by me, whether in shape of will, codicil, deed or otherwise." At the time this will was executed, Elijah Hale told Whitney that the word "deed" so put in referred to the deed made to the plaintiff, which was then in Whitney's custody, and that he meant to revoke and cancel it; and told Whitney never to deliver the deed to the plaintiff or tell him anything about it, but to hand it back to the grantor some time, as he then preferred to have the property go by his will rather than by the deed. On November 26, 1876, at the request of Elijah Hale, Whitney prepared another writing for a last will, and which was then executed by the former for that purpose, the first paragraph of which contained these words, "hereby revoking all former wills, testaments and writings to that effect, either by deed or otherwise." At the time of preparing this will, Elijah

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Hale said to Whitney that he must revoke and destroy the deed to the plaintiff; that he had the word "deed" so put in this will to revoke it; and that Whitney should hand it back to him some time, as he was not going to have all of his place go to the plaintiff, but meant to have half of it go to Joseph Hale, the plaintiff's son, as was provided in this will. On September 13, 1878, Elijah Hale, while talking with Whitney about the final disposition of his property, told him that he wanted his homestead place (the same described in said deed) to go to the plaintiff and to his son Joseph equally, and they could divide it to suit themselves; and that Whitney must hand back to him some time the deed he had made, and which was still in Whitney's custody, and never give it to the plaintiff or say anything to him about it. Upon the appointment of Joslin as executor, Whitney, upon his demand, delivered said deed to him; and the plaintiff never demanded the deed of Whitney.

At the hearing, before *Lord*, J., it was agreed that the answer of Whitney should be taken as an agreed statement of facts; and the judge reserved the case for the consideration of the full court.

G. A. A. Pevey, for the plaintiff.

E. R. Hoar & G. A. King, for the defendants, were not called upon.

W. ALLEN, J. We think the evidence shows that Elijah Hale did not intend that the deed should be delivered until his death. He did not intend that the plaintiff should have any present interest in the deed, but intended to keep in himself the dominion and control of it. It was in the hands of Whitney as a depositary for the grantor, and not as agent or trustee for the grantee. The act was intended to be in the nature of a testamentary act, which could be revoked at any time. As it was in fact revoked, it is not necessary to consider what effect it would have had if there had been no revocation. *Fairbanks* v. *Metcalf*, 8 Mass. 230, 237. *Hatch* v. *Hatch*, 9 Mass. 307. *Rockwood* v. *Wiggin*, 16 Gray, 402. *McGrath* v. *Reynolds*, 116 Mass. 566. *Shurtleff* v. *Francis*, 118 Mass. 154. *Wellborn* v. *Weaver*, 17 Ga. 267.

Bill dismissed.

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PATRICK LYNCH *vs.* NATHAN CROSBY & another.

Middlesex. Jan. 30. — Feb. 28, 1883. FIELD & W. ALLEN, JJ., absent.

Certiorari does not lie to quash the proceedings of a police court in issuing a warrant for the seizure of intoxicating liquors.

MORTON, C. J. This is a petition for a writ of certiorari to be directed to the judge and clerk of the Police Court of Lowell. The writ is sought, not to be used as ancillary to any other process, but for the purpose of quashing the proceedings of the said police court in issuing a search warrant for the seizure of intoxicating liquors. A writ of certiorari lies only to correct the errors of inferior courts, or officers acting judicially, in proceedings not according to the course of the common law. It does not lie to revise the acts of a court whose procedure is according to the course of the common law, and whose errors can be corrected by appeal or exceptions, or by a writ of error. Gen. Sts. *c.* 145, § 8. Pub. Sts. *c.* 186, § 7. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. *Tewksbury* v. *County Commissioners*, 117 Mass. 563. Police courts are courts of record, of common law jurisdiction, civil and criminal. In receiving complaints and issuing warrants for the seizure of intoxicating liquors illegally kept, they proceed according to the course and principles of the common law. Any decisions of the court may be appealed from. At the trial in the Superior Court, any legal objections to the complaint and warrant may be taken, and are the subjects of appeal or exceptions, or, in a proper case, of a writ of error. Though the cause for the search and seizure did not exist at common law, but is created by statute, this is immaterial. The procedure to enforce the statute is according to the course of the common law, in the same manner as are proceedings by indictment and trial for any new offence created by statute.

Without considering other objections to the petition, we are therefore of opinion that the court has no jurisdiction to issue a writ of certiorari in the case before us. *Petition dismissed.*

C. L. B. Whitney, (*P. Webster* with him,) for the petitioner.

W. B. Stevens, for the respondents.

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COMMONWEALTH *vs.* HIRAM P. HARRIMAN.

Barnstable. Jan. 18, 19. — Feb. 28, 1883. FIELD & W. ALLEN, JJ., absent.

Under the Const. Mass. c. 8, art. 1, providing that "all judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, ... provided, nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the Legislature," a judicial officer may be removed by address, for misconduct and maladministration in office, although he is liable to trial therefor, by impeachment, by c. 1, § 2, art. 8, of the Constitution.

An address to the Governor by both houses of the Legislature, under the Const. Mass. c. 3, art. 1, requesting the removal of a judicial officer, need not assign any reasons therefor.

INFORMATION, in the nature of a *quo warranto*, filed, June 28, 1882, by the Attorney General in behalf of the Commonwealth, at the request and upon the relation of Joseph M. Day, alleging that the defendant was usurping the office of Judge of Probate and Insolvency for the county of Barnstable. The case as it appeared from the pleadings, and the report of *C. Allen*, J., before whom it was heard, was as follows:

The relator was appointed Judge of Probate and Insolvency for the county of Barnstable, on May 19, 1858, by the Governor of the Commonwealth, with the advice and consent of the Council, and a commission was issued to him, by the terms of which he was "to hold the said office during the term of his good behavior therein, unless he shall be sooner removed in the manner prescribed by our Constitution." He took the oaths of office, and continued to do its duties until May 26, 1882, when he was removed from his office by the Governor, with the consent of the Council, upon the address of both houses of the Legislature. On June 7, 1882, the Governor nominated the defendant to fill the vacancy created by such removal, and his appointment was, on June 14, 1882, consented to by the Council; a commission was issued to him, he took the oaths prescribed by law, and entered upon the duties of his office.

The relator, to support the averments of his replication to the answer of the defendant, that he had been removed for alleged misconduct or maladministration in office, and not for any disability or infirmity, moral or physical, offered in evidence the

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report of a joint special committee of the Legislature, which set forth the charges against the relator, on which a hearing was had before the committee. This report, being objected to, was excluded.

The relator also offered in evidence a certificate of the Secretary of the Commonwealth, that the address of the Legislature to the Governor was in these words: "The two branches of the Legislature in General Court assembled respectfully request that your Excellency would be pleased, with the consent of the Council, to remove Joseph M. Day from the office of Judge of Probate and Insolvency for the county of Barnstable;" and that no other communication from the Legislature, or either branch thereof, to the Governor, or to the Council, in said matter, was or had been in the custody of the Secretary. This certificate was admitted, no objection being made to it. The judge reported the evidence excluded, and reserved the case for the determination of the full court.

If the evidence so excluded was incompetent, such judgment was to be entered as to law might appertain; otherwise, judgment to be entered on the case as reserved, with the evidence excluded.

T. H. Talbot & J. F. Botume, for the relator. 1. The principal question in this case is as to the true construction of this clause of our Constitution: "All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution: provided nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the Legislature." Const. Mass. *c.* 3, art. 1. A previous provision of the Constitution declares the Senate to be "a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices." It further provides, that "previous to the trial of every impeachment the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence." Const. Mass. *c.* 1, § 2, art. 8.

The question then is whether a judicial officer may be removed by address for misconduct and maladministration in office,

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notwithstanding the Constitution has made special provision for the trial of such offences, one penalty for which is declared to be his "removal from office," or whether the power of removal by address applies only to cases of physical or mental inability to perform the duties of his office, and to cases where he has already been convicted by a court of justice.

The clause giving the power of removal by address establishes a tenure of office during good behavior; and it is taken from the English Settlement Act of 1700. This act provides, that "judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of Parliament it may be lawful to remove them." St. 12 & 13 Wm. III. *c.* 2, § 3.

Although, before 1700, the tenure of a judicial office depended on the pleasure of the Crown, yet the Crown by the act of removal did not determine the behavior of a judge as good or bad. That could be determined only by due process of law. *Bacon's case*, 2 How. St. Tr. 1087. *Scroggs's case*, 8 How. St. Tr. 163, 193, 216. *Clarendon's case*, 6 How. St. Tr. 291, 330, 334, 350. In the enactment of 1700, "good behavior" meant something the opposite of which could only be ascertained judicially; and Parliament, by enacting that judicial officers should hold office during good behavior, intended that they should hold until the opposite of good behavior should be judicially established. Such was the construction put by the House of Lords upon the English statutes in 1806, in the only case in which, in that country, so far as we know, an attempt has been made to remove a judge by address. In that case, a proceeding to remove by address a judge for misconduct in office was ended upon the ground, as the debates show, that it was not within the intent of the statutes.*

* The case referred to is that of Mr. Justice Fox, of the Court of Common Pleas, in Ireland. In 1804, petitions were presented both to the House of Commons and to the House of Lords for his removal by address, for misconduct in office. In the Commons, the petitions were laid upon the table. In the Lords, the case was heard *ex parte* before a committee, and afterwards was partly heard before the House, the respondent being present by counsel. Finally, in 1806, a motion was made by Lord Grenville that the proceeding be adjourned for two months, to a day when the House in all probability would not meet. This was done for the express purpose of

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The practice in this Commonwealth conforms to our view of the law. Prior to the case at bar, no one has been removed from a judicial office for misconduct in office, except upon a judicial ascertainment of such misconduct. In 1803, Paul D. Sargent and William Vinal, judges of the Court of Common Pleas were removed from office by address. But the address states the cause as follows: "Having been duly convicted before the Supreme Judicial Court, of the crime of wilful extortion in their offices of justices of the Court of Sessions." * In

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putting an end to the proceeding. The motion was carried by a majority of nine. See 1 Hansard, ii–vii.

The case is of interest, as being the first in which the power of removal by address was invoked in England. The debate on the motion of Lord Grenville is reported 1 Hansard, vii, 755–772. Among those who spoke in favor of the motion were Lord Grenville and Lord Chancellor Erskine. Opposed to it were Lord Eldon and others. On p. 788 of the volume referred to is recorded the formal protest of the Marquis of Abercorn and of Lord Eldon, and of others whose names are not given. It was contended in support of the motion that the power of removal by address was intended to apply where a judge was physically incapacitated from performing the duties of his office, or where he had been tried and convicted elsewhere. Some stress was also laid upon the fact, that, if the House of Lords should vote in favor of an address, the House of Commons might see fit to proceed by impeachment, and then the case would come before the House of Lords prejudged and predetermined. Lord Grenville also relied upon the case of Lord Chief Justice Holt, which was before the House of Lords in 1698, as a precedent. But the only question in that case was whether the Chief Justice should be compelled to give to a committee of the House of Lords his reasons for a judgment rendered by him in the King's Bench. See 2 Campbell's Lives of the Chief Justices, 148–152. The protest filed by Lord Eldon and others, above referred to, states that "it is the clear right of this House, according to the provisions of the Act of Settlement of the 12th and 13th William III., to entertain in the first instance a motion for an address to his Majesty for the removal of a judge, provided the facts alleged as the grounds of the address shall be sufficient to justify the proceeding, and shall have been proved to the conviction of the House."

* The address, which is on file in the office of the Secretary of the Commonwealth, is as follows:

"May it please your Excellency: The two branches of the General Court, sensible how important it is that the characters of men appointed to superintend the execution of the laws should be pure and unsullied, and that their integrity, uprightness and disposition to obey the laws should not be subject to any just suspicion, take the liberty to make known to your Excellency, that Paul Dudley Sargent, of Sullivan in the county of Hancock,

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1821, James Prescott was removed from the office of Judge of Probate for the county of Middlesex; but he was formally tried by the Senate as a court of impeachment. See *Prescott's case.* In 1858, Edward G. Loring was removed by address from the office of Judge of Probate for the county of Suffolk; but his was not a case of official misconduct. See Special Message of the Governor to the Legislature, of March 19, 1858.

2. The clause of the Constitution declaring that "the Senate shall be a court with full authority to hear and determine all impeachments . . . . for misconduct and maladministration" in office, further provides that "the party so convicted shall be, nevertheless, liable to indictment, trial, judgment and punishment, according to the laws of the land." It was stated by

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Esquire, and William Vinal, of Vinalhaven, in the same county, Esquire, justices of the peace within and for that county, and also justices of the Court of Common Pleas in and for said county, have been duly convicted, before the Supreme Judicial Court, holden within and for said county of Hancock, for the counties of Hancock and Washington, of the crime of wilful and corrupt extortion in their offices of justices of the Court of Sessions, by means of which conviction the confidence of the people must be in a great degree diminished in the said Sargent and Vinal, and the honor and dignity of the government require that men against whom such charges have been substantiated should not be permitted to exercise offices of such high trust and importance. The General Court therefore request that your Excellency would be pleased, by and with the advice and consent of Council, to remove the said Paul Dudley Sargent and William Vinal from their said offices of justices of the Court of Common Pleas, and of justices of the peace in and for the said county of Hancock."

John Quincy Adams and John Woodman were allowed by the Senate to file the following reasons for their dissent from the vote authorizing the address: "First. Because the grounds alleged in the said address for removal are for official misdemeanors; and they conceive it to be the intention of the Constitution that no judicial officer should be removed from office by the mode of an address of the two Houses, on the ground of offences for the trial of which the Constitution has expressly provided the mode of impeachment. Second. Because they consider the independence of the judiciary as materially affected by a mode of proceeding which in its effects must make the tenure of all judicial officers dependent upon the verdict of a jury in any one county of the Commonwealth. Third. Because the decision of the Senate in this case, affecting in the highest degree the rights, the character and reputation of two individual citizens of this Commonwealth, ought not to have been taken without giving them an opportunity previously to be heard in their own defence." Senate Journal, 1802–3, p. 339.

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Mr. Lemuel Shaw, one of the managers in the trial of Judge Prescott, that the Senate in such a case sits as "a court of justice, of criminal jurisdiction, possessing all the attributes and incidents of such a court." *Prescott's case*, 182. Jurisdiction therefore being given to the Senate, as a court, of the offence of judicial misconduct, such jurisdiction must be exclusive, except so far as concurrent jurisdiction is given to some other tribunal. The Constitution states one express exception, namely, the right of the appropriate tribunal to proceed by indictment, but it states no other. This clause of the Constitution makes judicial misconduct a crime, and designates the Senate as the tribunal to try it. Being a crime, it falls within the 12th article of the Declaration of Rights, which declares that "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." It also gives him the right "to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election." Whereas, if the contention of the defendant is correct, that the power of removal by address exists for misconduct in office, no cause need be assigned, no trial need be had, and, if the wills of the Governor and Council and of both branches of the Legislature are in unison, a judge may be removed because such is their pleasure, and the provision that "judicial officers shall hold their offices during good behavior" becomes of no effect. No inference can be drawn from the general phraseology of the clause relating to removal by address, that it was intended to cover a matter before specially provided for. *Field* v. *People*, 2 Scam. 79, 83. *Warner* v. *People*, 2 Denio, 272. *Page* v. *Hardin*, 8 B. Mon. 648, 672. *Lowe* v. *Commonwealth*, 3 Met. (Ky.) 237, 242.

3. The phraseology of the clause of the Constitution in question indicates that it was not intended to apply to the case of maladministration in office. It declares that "all judicial officers shall hold their offices during good behavior: provided, nevertheless, the Governor, with consent of the Council, may remove them." The natural meaning of this is, that, notwithstanding good behavior, they may be removed, not that they may be removed for bad behavior. That was already provided

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for by impeachment. A proviso cannot by implication repeal the enacting clause. It merely excepts something therefrom. It may except the case of physical disability out of the tenure of good behavior; it can do no more. It cannot reach the subject of bad behavior, which is not in the enacting clause. In *Minis* v. *United States*, 15 Pet. 423, 445, it is said by Mr. Justice Story, "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."

It was generally admitted in the Constitutional Convention of 1820, that the intent of the framers of the Constitution of 1780 was to limit the power of removal by address to the case of physical and mental disability, and some of those who opposed the amendments then proposed did so upon the ground that they were unnecessary, as the power of removal by address applied to cases where a trial would be ineffectual, or where it ought not to be had.* [The counsel then proceeded to discuss the

* As the opinions expressed in the debates in the Constitutional Convention of 1820 were relied upon by the counsel for both parties in argument, and are referred to by the court in the opinion, an abstract of them so far as they relate to the point in issue is here given. The references are to the pages of the Journal of Debates in the edition of 1853.

The first debate arose on the consideration of the resolution of the select committee, which proposed to alter the Constitution so that judicial officers should be removable by the Governor and Council upon the address of two thirds (instead of a majority) of each branch of the Legislature.

Mr. Pickman, of Salem, said, p. 473, that "it was proper to have a provision of a similar nature, to meet cases that were not the proper subject of impeachment, such as incapacity from natural infirmities; and he thought that requiring the consent of two thirds of each branch of the Legislature would secure the public in cases of manifest incapacity of this kind, and at the same time give greater independence to the judges."

Mr. Hubbard, of Boston, (afterwards Mr. Justice Hubbard,) said, p. 474, that "the Constitution was defective in not sufficiently securing the independence of the judges;" and asked if a judge was free, when the Legislature might have him removed whenever it pleased. He further argued, that the tenure of office of judges was not during good behavior, if the Legislature might deprive them of their office, although they had committed no crime; and that "sufficient provision was made in the case of misconduct in the power of impeachment."

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admissibility of the evidence offered to show that the removal was for acts of official misconduct, admitting that the question

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Mr. Shaw (afterwards Chief Justice Shaw) said, p. 476: "The general principle was, that they [the judges] should be independent of other persons during good behavior. What is meant by good behavior? The faithful discharge of the duties of the office. If not faithful, they were liable to trial by impeachment. But cases might arise when it might be desirable to remove a judge from office for other causes. He may become incapable of performing the duties of the office without fault. He may lose his reason, or be otherwise incapacitated. It is the theory of our government that no man shall receive the emoluments of office, without performing the services, though he is incapacitated by the providence of God. It is necessary therefore that there should be provision for this case. But in cases where it applies, the reason will be so manifest as to command a general assent. It must be known so as to admit no doubt, if a judge has lost his reason, or become incapable of performing his duties. As it does not imply misbehavior, if the reason cannot be made manifest so as to command the assent of a great majority of the Legislature, of two thirds at least, there can be no necessity for the removal. By the Constitution as it stands, the judges hold their offices at the will of the majority of the Legislature."

Mr. Freeman, of Sandwich, said, p. 477, that "he should have liked this clause as well if the committee had proposed to limit the power of the Governor and Council to remove judges on the address of the two branches of the Legislature to specific cases, such as insanity or disability. But he was willing to adopt the resolution now reported. The judges were not now independent of the other departments of government."

Mr. Prescott, of Boston, argued in favor of the resolution, on the ground that the judges should be independent, and said, p. 477: "The two other departments may remove them without inquiry — without putting any reason on record. It is in their power to say that the judges shall no longer hold their offices, and that others more agreeable shall be put in their places. . . . . The mode of removal by address was introduced into the British government for the purpose of restraining the power of the Crown, but into ours for another purpose — to provide for a case which could not properly be reached by the power of impeachment."

Mr. Daniel Davis, of Boston, said, p. 478: "The Constitution contemplates removal of judges from office for two causes only. For crime, by impeachment on the grand inquest by the representatives — and for being disqualified to perform the duties of the office by the visitation of God. . . . . The power of removal by address, which was intended to apply only to cases of disqualification by the visitation of God, in fact extended much farther, and was liable to be abused. It was a defect which ought to be remedied. . . . . If the resolution were before the committee in a form which admitted of amendment, he would propose to alter it in such manner

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was immaterial, if the power of removal by address applied to impeachable offences. This portion of the argument is omitted.]

B. Wadleigh & G. A. King, for the defendant.

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that the officer to be removed should have a right to be heard. No reason need now be given for the removal of a judge, but that the Legislature do not like him."

Mr. Childs, of Pittsfield, said, p. 479, that "it was in violation of an important principle of the government that the majority of the Legislature, together with the Governor, should not have the power of removal from office."

Mr. Cummings, of Salem, p. 479, argued in favor of the Constitution as it was, on the ground that "this provision is not intended to embrace cases of crime — it is only for cases when they become incompetent to discharge their duties."

Mr. Holmes, of Rochester, said, p. 481: "When a judicial officer has been guilty of maladministration, he will be removed by impeachment. When it was necessary to remove a judge for any other cause, he thought that two thirds of both branches would always concur in the removal."

Mr. Webster, p. 482, said: "As the Constitution now stands, all judges are liable to be removed from office by the Governor, with the consent of the Council, on the address of the two houses of the Legislature. It is not made necessary that the two houses should give any reasons for their address, or that the judge should have an opportunity to be heard. I look upon this as against common right, as well as repugnant to the general principles of the government."

The clause in question was then struck out by a vote of 210 in the affirmative to 105 in the negative.

The second debate was on the amendment proposed by Mr. Webster, p. 489, that "No address for the removal of any judicial officer shall pass either house of the General Court, until the causes of removal are first stated, and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence."

Mr. Childs, p. 521, said that "he thought that, by adopting the amendment, the intention of the provision for removal of judges by address of the two houses would be done away. It placed this proceeding on the footing of impeachment, and it might as well be struck out. The object in giving the power to the Legislature was, that judges might be removed when it was the universal sentiment of the community that they were disqualified for the office, although they could not be convicted on impeachment."

Mr. Austin, of Boston, p. 522, thought the alteration unnecessary; and, after referring to the liability of judges to punishment, for great crimes, by impeachment, said that the Constitution admitted that there might be

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MORTON, C. J. This is an information in the nature of a *quo warranto*, filed by the Attorney General, in behalf of the Commonwealth, at the relation of Joseph M. Day, to try the title of the defendant to the office of Judge of Probate and Insolvency for the county of Barnstable. The relator formerly held that office, having been appointed and qualified in 1858; and, in 1882, he was removed therefrom by the Governor, with consent of the Council, upon the address of both houses of the Legislature; and the defendant was appointed in his place.

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cases in which judges might be removed, without supposing a crime; that if a judge had so far lost public confidence that his usefulness would be destroyed, he ought to be removed, "but if witnesses were to be summoned to prove specific charges, it would be impossible to remove him."

Mr. Justice Story, arguing in favor of the amendment, p. 524, remarked: "It was said that the judges should hold their offices during good behavior — the terms were so in the Constitution — but while another clause of the Constitution remained, the fact was not so. The Governor and Council might remove them on the address of a majority of the Legislature, not for crimes and misdemeanors, for that was provided for in another manner, but for no cause whatever — no reason was to be given. . . . . He does not hold the office by the tenure of good behavior, but at the will of a majority of the Legislature, and they are not bound to assign any reason for the exercise of their power. *Sic volo, sic jubeo, stet pro ratione voluntas.* This is the provision of the Constitution, and it is only guarded by the good sense of the people." And, on p. 526, he contended that the object of the St. 12 & 13 Wm. III. "was not to give power to Parliament to remove the judges, but to induce the King, by a compromise, to give up a greater right."

The resolution was then passed by a vote of 221 to 3. It was submitted to the people with two other proposed changes, one of which provided that justices of the peace might be removed by address, the other being that the Governor and the two branches of the Legislature should not be authorized to propose questions to the justices of the Supreme Judicial Court and require their opinions thereon. The three proposed changes were voted on as one, and were not ratified by the people, the majority against them being 2047 in a vote of 26,989.

In his argument in *Prescott's case*, in 1821, Mr. Shaw, one of the managers, said: "It is true, that by another course of proceeding warranted by a different provision of the Constitution, any officer may be removed by the Executive, at the will and pleasure of a bare majority of the Legislature; a will, which the Executive in most cases would have little power and inclination to resist. The Legislature, without either allegation or proof, has but to pronounce the *sic volo, sic jubeo*, and the officer is at once deprived of his place, and of all the rank, the powers and emoluments belonging to it." *Prescott's case*, 181.

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The relator contends that his removal was unconstitutional and void; that he is now *de jure* the Judge of Probate and Insolvency for the county of Barnstable; and therefore that the defendant has no title to the office. The principal ground upon which he founds his claim is that the charges upon which he was removed were charges of misconduct and maladministration in office, for which he was liable to impeachment, and that the constitutional power of removal by address does not include the power to remove for offences which are impeachable. The question is an important one.

No student of the Constitution and its history can fail to see that it was the purpose of those who framed it, and of the people who adopted it, to establish a carefully prepared system of government, consisting of three coördinate departments, the executive, legislative and judicial, each, as far as practicable, independent of the others, each balancing yet protecting, checking yet preserving, the others.

In this division of the functions of government, it was undoubtedly deemed to be of the first importance to the protection of the liberties and rights of the citizens, that the judiciary should be put upon such a basis, and protected by such constitutional guaranties, that it should be fearless and independent, and free from undue control and encroachments by the other departments.

These purposes could not be more forcibly stated than in the impressive language of the Declaration of Rights: "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws." "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative

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and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Declaration of Rights, arts. 29, 30.

The Declaration of Rights is entitled "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts." It was intended as a general declaration of the great, fixed and fundamental principles of reason and right which underlie our system of government and are the safeguards of liberty. It declares general principles which are to guide all departments of the government in their respective duties of making, executing and interpreting laws; but it does not purport to lay down specific rules of action, or to exactly define the extent and limitations of the powers of each department. For these we must look to the other part of the Constitution, "the Frame of Government." And when we find that the general statements of the Declaration of Rights are qualified and limited by more specific provisions upon the same subject in the Frame of Government, the latter must control and govern.

The chapter upon the "Judiciary Power" provides that "The tenure, that all commission officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution: provided nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the Legislature." Const. Mass. *c.* 3, art. 1. The decision of this case depends upon the true construction of this article.

The relator contends that the only effect of the proviso is to give the power of removal by address for causes other than misconduct and maladministration in office, and that for such misconduct an exclusive remedy is provided by impeachment under *c.* 1, § 2, art. 8, of the Constitution. We are not able to see any just rule of construction by which we can thus limit and qualify the plain language of the proviso. The language is broad and general; in its terms it includes a removal for any cause which is deemed by the legislative and executive departments

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sufficient. If it had been intended to exclude from this provision the power to remove for misconduct in office, leaving that to be dealt with by impeachment exclusively, it would have been so stated. Neither this article nor the article on impeachment contains any indication that the power of impeachment was to exclude the power of removal by address. We must give to the proviso the broad meaning which its language imports.

The article reaffirms the great principle asserted in the Declaration of Rights, that judicial officers shall hold their offices during good behavior; but it was deemed wise, as a check upon the absolute power and independence of the judicial department, to confide in the other two coördinate branches of the government the exceptional power of removing judicial officers by address when an exigency requires it, of which, from the nature of the case, they must be the sole judges. The obvious and natural meaning of the language used seems to us to require this construction, and our view is confirmed by the history of this provision.

It was undoubtedly taken from the English act of Parliament by which the Crown was settled upon the house of Hanover, which provided that, "after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of Parliament it may be lawful to remove them;" and from the later statute of 1 Geo. III. *c.* 23, § 1, containing the same provision as to removal by address.* The language of the provisions of these statutes is clearly broad enough to authorize a removal by address for any cause which might seem sufficient to both houses of Parliament, including misconduct in office.

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* Prior to the St. of 1 Geo. III. *c.* 23, § 1, which was passed in 1760, the commissions of judges terminated on the demise of the Crown. The language of the act is: "The commissions of judges for the time being shall be, continue and remain in full force, during their good behavior, notwithstanding the demise of his Majesty (whom God long preserve) or of any of his heirs and successors; any law, usage or practice to the contrary thereof in any wise notwithstanding. Provided always, ... that it may be lawful for his Majesty, his heirs and successors, to remove any judge or judges upon the address of both houses of Parliament."

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The draft of a constitution prepared by the Council and Representatives acting as a convention, in 1778, contained no provision for removal by address. It was rejected by the people, and is of no importance in this discussion.

In September 1779, was assembled the Convention of Delegates, elected for the special purpose of framing a Constitution, which continued in existence until June 1780, and the result of whose labors was the Constitution of 1780, as ratified and adopted by the people. It is to be regretted that we have so meagre a report of the doings of this important Convention. Among its first acts was the appointment of a committee to frame a declaration of rights and the form of a constitution, to be laid before the Convention. This committee afterwards reported in favor of a declaration of rights and frame of government, which was mostly the work of John Adams, and which served as the groundwork of the future deliberations of the Convention. See 4 Adams's Works, 215, 216.

It is clear from the imperfect record which has come down to us, that the subject of the tenure of office of the judiciary was considered as a matter of the first importance. The clauses which we are considering were, as the journal tersely says, "largely debated," and were finally adopted by the Convention in the same form substantially as that in which they were drafted and presented by Mr. Adams. In this form they were accepted by the people, and have stood unaltered as the fundamental law to this day, notwithstanding the several attempts which have been made to modify them.

The power of removal by address thus established has been infrequently exercised, but it is an instructive fact that in 1803 two justices of the Court of Common Pleas were removed by address for extortion in office, misconduct for which they were clearly liable to impeachment. Added significance is given to this action of the legislative and executive departments by the fact that Governor Strong, who removed them, was a member of the Convention and of the committee which prepared the draft of the Constitution.

In the Convention of 1820, elected by the people to revise the Constitution, many of its most prominent members, who are recognized as among the most eminent jurists and statesmen of

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the country, made a strenuous effort to change the provision for removal by address established by the Constitution of 1780. Their arguments were, that the provision, as it stood, gave an absolute and unlimited power to the legislative and executive departments, at their will and pleasure, to remove a judge, without a judicial hearing and without assigning any cause; and that this endangered the freedom and independence of the judiciary, and was inconsistent with the great principles of the Declaration of Rights. They proposed to amend the third chapter of the Constitution, on the judiciary power, so that it should read that "the Governor, with the consent of the Council, may remove any judicial officer upon the address of two thirds of the members present of each house of the Legislature." This proposition was rejected by the Convention by a large majority. The same members were more successful in inducing the Convention to adopt an amendment, providing that "No address for the removal of any judicial officer shall pass either house of the Legislature until the causes of such removal are first stated and entered on the journal of the house in which it shall originate, and a copy thereof served on the person in office, so that he may be admitted to a hearing in his defence before each of said houses." This amendment was submitted to the people and rejected by them, they thus decreeing that the power of removal by address should stand as it did in the Constitution of 1780. No change was made in this provision in the Constitution which was submitted to the people by the Convention of 1853, and rejected by them.

We think the uniform practice since 1780 has been to regard this provision as conferring an unrestricted power of removal upon the legislative and executive departments. When we consider the origin and history of the provision, the obvious and natural meaning of its language, and the uniform practical construction which has been given to it, we are forced to the conclusion that the intention of the people was to entrust the power of removal of a judicial officer to the two coördinate branches of the government without limitation or restriction.

The relator strongly contends that, upon this construction of the Constitution, the tenure of judicial office is not during good behavior, but at the will of the other departments of the

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government. It seems to us that this is arguing against the existence of a power clearly conferred, from the fact that it may be abused and perverted. There is no more danger of the abuse of the power of removal, if it includes the right to remove for impeachable offences, than there would be if it were confined, as the relator contends it should be, to cases of physical, mental or moral disability of a judicial officer, of which necessarily the removing power must be the sole judge. Any power may be abused. The judiciary might corruptly declare any law or body of laws to be unconstitutional and invalid, and thus encroach upon the powers of the Legislature; yet no one doubts the right and duty of the judiciary to declare invalid any law which in its judgment violates the Constitution.

In confiding to the two coördinate branches of the government this important and exceptional power of removing the judiciary, the people found a sufficient protection to the substantial independence of the judicial department in the constitutional guaranties thrown around it, in the fact that the removal can only be made by the concurrent action of both houses of the Legislature and of the Governor and Council, all of whom are directly answerable to the people at frequently recurring periods, and in the trust and confidence they may rightfully repose in their servants and agents that in the exercise of any power committed to them they will act in obedience to their oaths of office, and in the spirit of the fundamental principles of the Constitution.

The view we have taken of the principal question involved disposes of the other questions raised by the relator at the hearing. They relate to the offer of evidence by him to prove the causes for which he was removed, and the evidence upon which the Legislature voted the address. The Constitution authorizes the removal without any reason being assigned for it; and therefore it is wholly immaterial what evidence or causes induced the Legislature to vote the address, or led the Governor and Council to act upon it. The evidence therefore was rightly excluded. *Information dismissed.*

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BENJAMIN BELCHER & another *vs.* JOHN R. WHITTEMORE & another.

Hampden. Sept. 26, 1882. — March 1, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

If a member of a copartnership, the articles of which provide that each partner is to give his time to the business of the firm, and is not to engage in any other speculation or business in his own name and on his own account to the detriment of the firm, uses his time, and labor and materials belonging to the firm, in making improvements in machines manufactured and sold by the firm, with the knowledge and without the objection of the other partners, they can claim no interest in letters patent procured by him, at his expense and in his name, for such improvements.

W. ALLEN, J. This is a bill in equity in which the plaintiffs claim an interest in letters patent issued to the defendant John R. Whittemore for inventions made by him. When the inventions were made and the letters patent issued, the parties were copartners in the business of manufacturing and selling agricultural implements, and in the foundry business, and the patents were for improvements in agricultural implements. The inventing and patenting of new and improved machines was no part of the business of manufacturing and selling them, and did not come within the scope of the partnership business. The facts do not disclose any contribution of means by the copartnership which would give it an interest in the result. The time, labor and materials belonging to the copartnership, which were used by Whittemore in perfecting his inventions, with the knowledge and without the objection of the other partners, were clearly not regarded by any one as contributions to the work by the firm which would give it a property in the inventions which might be made. It is true that by the articles of copartnership each partner was to give his time to the business of the firm, and not to engage in any other speculation or business in his own name and on his own account to the detriment of the firm; that Whittemore used his time, and labor and materials belonging to the firm, in making improvements in machines manufactured and sold by it; and that for some of the improvements so made he procured at his own expense, and in his own name, and

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for his own benefit, letters patent. But this did not make such inventions the property of the copartnership. If he violated his agreement, or used the property of the firm without the consent of his copartners, he was liable therefor. But it does not appear that he did anything to the detriment of the firm, or without the consent of his copartners. The improvements he devised, whether patented or not, were a benefit to the firm by increasing its business, and no objection was made by any member of it, either to the making use by Whittemore of the facilities furnished by the business for making experiments and improvements, or to the procuring of letters patent by him for inventions so made. We know of no principle or decision which, upon the facts in the case, could give to the copartnership any right in the patents. *Bill dismissed.*

C. L. Long, for the plaintiffs.

G. Wells, for the defendants.

MECHANICS' NATIONAL BANK *vs.* EDWARD B. ROBINS & another.

Worcester. Oct. 4, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action against the acceptor of a draft, there was evidence that the drawer of the draft was liable on a note held by a bank and soon to fall due; that it was agreed between the defendant, the drawer and the bank, that the defendant should accept a draft in favor of the bank, which draft should be discounted by the bank and used to pay the note, and that the note should be delivered to the acceptor. *Held*, that it was a necessary part of this agreement that the bank on discounting the draft should become the owner of it.

CONTRACT against the members of a firm, doing business under the name of Robins and Bullens, as acceptors of a draft for $2386.63, dated Worcester, July 13, 1880, drawn upon the defendants by the "Adriatic Woollen Mills, James A. Smith, Agt.," and payable five days after sight. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

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The plaintiff produced the draft, and proved the acceptance of it by the defendants on July 14, 1880, and rested its case. The defendants then put in evidence tending to show the following facts:

Prior to July 9, 1880, H. H. Chamberlain and Oscar J. Smith were partners, doing business under the firm name of the Adriatic Woollen Mills, James A. Smith, agent. About that date, Chamberlain became personally insolvent, and on July 9 assigned his property, including his interest in the partnership, to Harrison Bliss, the president of the plaintiff bank, and James A. Smith, in trust for his creditors; and his assignees and Oscar J. Smith continued the business under the same firm name, and opened an account with the plaintiff bank. The defendants were, and had been, the selling agents of the firm in Boston. The plaintiff bank then held a note of the firm for $1500, and a draft on the firm for $886.63, both due on July 13, 1880. There were also other liabilities of the firm soon to become due.

The defendant Robins testified that on said July 13 he had an interview with Bliss and James A. Smith, at which he proposed a scheme to enable the firm to continue business, by providing for its liabilities then about to mature, part of which was that the firm should, on July 13, draw a draft on the defendants for $2386.63, which the defendants would accept; that the bank should discount the draft, and with it pay the note and draft falling due that day. Robins further testified as follows: "I told Bliss he must agree to discount my acceptances and trust me to that extent; that I must have my vouchers, that is, the notes, and I would take my chances whether they were good or bad; that I must have them, I meant the note and draft; that I considered it was safe to take the paper paid by the draft, and he was to hand it to me; he called the cashier, and Bliss told him to make out a draft for the amount. The draft was presented to me, and I said I would rather have it come through the Boston Bank in regular course of business. Bliss agreed to put the amount of the draft to the credit of the firm that day. The draft came and I accepted it, but I never received the note and draft from the bank as my collateral."

Robins further testified that he went to the plaintiff bank on July 16th, and asked the cashier for the note and draft, but he

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declined to give them up, as he had not received a check from Smith for $1500; that on the 17th he wrote to the plaintiff bank requesting that the note and draft be sent to him; that on the 21st, not having received any answer to the letter of the 17th, he wrote a letter, addressed to Bliss as president of the plaintiff bank, in which the defendants declined to pay the draft, on the ground, among others, that the note and draft of the Adriatic Mills had not been given up; that, on the 22d, before the acceptance was brought in for payment, he received a telegram from the cashier of the plaintiff bank, as follows: "Mr. Bliss has not been well, and did not fully understand about your acceptance; I hold the Adriatic Mills note and draft as your property and subject to your order;" that he understood the telegram, but did not believe it, as the cashier had twice refused to give up the note and draft; that it made no difference whether he received the note and draft on the 17th or the 22d; and that the cashier afterwards offered to give up the note and draft.

It further appeared that on July 13th the amount of the draft in suit was placed by the plaintiff to the credit of the account of the Adriatic Woollen Mills, and went to pay the note to the bank of $1500, and the draft of $886.63.

On this evidence, the plaintiff asked the judge to rule that it furnished no legal ground of defence; and that the plaintiff was entitled to a verdict. The judge so ruled; the jury returned a verdict for the full amount of the draft; and the defendants alleged exceptions.

J. C. Ropes, (*W. S. B. Hopkins* with him,) for the defendants, contended that there was evidence which would warrant the jury in finding that the acceptance was delivered upon a condition, and that this condition had not been performed; and cited *Watkins* v. *Bowers*, 119 Mass. 383; *Sweet* v. *Stevens*, 7 R. I. 375; *Benton* v. *Martin*, 52 N. Y. 570, 574; *Bell* v. *Ingestre*, 12 Q. B. 317; *Pym* v. *Campbell*, 6 El. & Bl. 370, 374; *Lloyd* v. *Howard*, 15 Q. B. 995; *Adams* v. *Jones*, 12 A. & E. 455; *Marston* v. *Allen*, 8 M. & W. 494; *Furness* v. *Meek*, 27 L. J. (Exch.) 34.

F. P. Goulding & *F. H. Dewey, Jr.*, for the plaintiff.

FIELD, J. The defendants contend that there was evidence for the jury that the draft was never delivered to the plaintiff

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except upon a condition which was not performed. It is not denied in argument that, if the draft was delivered to the plaintiff, so that it acquired title to it, the evidence discloses no defence to the action. *Waterhouse* v. *Kendall*, 11 Cush. 128. *Thayer* v. *Stevens*, 11 Cush. 167. *Hodgkins* v. *Moulton*, 100 Mass. 309. *Davis* v. *Randall*, 115 Mass. 547. *Allen* v. *Furbish*, 4 Gray, 504. *Perkins* v. *Young*, 16 Gray, 389.

The evidence was uncontradicted that it was the agreement between the defendants, the plaintiff and the Adriatic Woollen Mills, that the draft should be drawn by the Adriatic Woollen Mills, accepted by the defendants, and discounted by the bank; that the proceeds should be used to pay the note and draft then held by the bank against the Adriatic Woollen Mills, and that the note and draft thus paid should be delivered by the bank to the defendants. In accordance with this agreement, the Adriatic Woollen Mills made the draft to their own order and indorsed it to the bank, by which it was discounted and the proceeds passed to the credit of the drawers, and the defendants then accepted the draft in writing, unconditionally, in accordance with their promise, made before the draft was drawn. Apparently the draft was indorsed and delivered to the plaintiff by the drawers the day before the defendants wrote their acceptance upon it. It is a necessary part of this agreement that the bank should, on discounting this draft, become the owner of it. The indebtedness of the Adriatic Woollen Mills to the bank on the note for $1500 and the draft for $886.63, whether that was an indebtedness of the old firm or of the new, could not be paid until this was done; and, until this indebtedness was paid to the bank, the note and draft were not to be delivered to the defendants. A condition that the draft declared on should not become the property of the bank until the note and draft then held by the bank were delivered to the defendants, is inconsistent with the agreement that the draft accepted by the defendants should be discounted by the bank in order to pay out of the proceeds the note and draft then held by it; and there is no evidence which would warrant a jury in finding that the draft in suit was delivered to the bank on any such condition. There was no evidence from which the jury could find that the Adriatic Woollen Mills, in indorsing and delivering this draft to the plaintiff,

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intended that the plaintiff should take no title to or interest in it until the note and draft then held by it were delivered to the defendants.

It is unnecessary to consider whether this court would follow the decision in *Bell* v. *Ingestre*, 12 Q. B. 317, if the facts were the same. *Exceptions overruled.*

WILLIAM T. GRANT *vs.* GEORGE F. MELLEN.

Bristol. Oct. 24, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If A. is induced by the false representations of B. to buy property of him, and to give in payment therefor his promissory note indorsed by C., which, before maturity, is transferred by B. for value to an innocent purchaser, to whom C. pays it, and if A. rescinds the sale, or the property bought by him is of no value, he may recover, in an action against B., the amount paid by C., with interest from the time of such payment.

TORT for false and fraudulent representations, with a count in contract for money had and received. Answer, a general denial. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defendant, a short time prior to March 15, 1879, proposed to the plaintiff to sell to him for the sum of $1000, payable in two promissory notes of $500 each, the one half interest which the defendant said he owned in the publishing business of a newspaper styled The Daily Record, published in Fall River, and represented to the plaintiff that the defendant's interest comprised a half interest in everything used in the publication of said newspaper, including printing presses, type, and all the materials and furniture connected with such publication; that three thousand copies of said newspaper were published per day; that the sales of the newspaper and job printing paid all the expenses of the business, leaving the proceeds of advertising as a clear profit; that one half interest in the business of said newspaper was owned by William O. Milne, who had mortgaged his interest to one Dunlap for the sum of $500; and that the defendant

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owned the other half interest in the business of said newspaper. The plaintiff, relying upon and induced by these representations of the defendant, agreed to purchase the defendant's interest in the business of said newspaper, and upon the request of the defendant, before any papers, which the defendant promised to make, were executed to carry into effect said arrangement, the plaintiff made and delivered to the defendant the plaintiff's promissory note for $500, indorsed by Elihu Grant, the plaintiff's father, payable in four months from date. At the time these representations were made by the defendant, and the note given, one Timothy L. Dunlap held a mortgage of one half and a bill of sale of the other half of the newspaper business and property; the daily publication of the newspaper did not exceed one thousand copies; the business of publishing said newspaper and connected therewith was yielding no profit; and the defendant owned no part of the stock, presses, furniture, &c. of the business, and had contributed to his partnership with Milne a sum of money not exceeding $450. When the plaintiff ascertained these facts, which knowledge was obtained after giving the defendant the note for $500, he demanded of the defendant the restitution of said note, on the ground that he had received no value for it, and the defendant promised to make this restitution, or to provide for the payment of the note at its maturity. The defendant passed the note before its maturity to a purchaser, who had no notice of the facts affecting the consideration of the note; and, upon its maturity and after suit thereon, the note was paid by Elihu Grant, the indorser thereof. Articles of copartnership between the plaintiff and Milne were executed; and the plaintiff contributed $61 for the payment of persons employed in the business of said newspaper, and assisted in its business for about two weeks, and then ceased to have any participation in or connection with its business. There was no evidence of any public record of the mortgage, or of the bill of sale to Dunlap.

The judge found that the plaintiff was induced by the representations made by the defendant to make and deliver the note of $500, and that these representations were false and fraudulent; and ruled, as matter of law, upon the facts found and above stated, that the plaintiff was entitled to recover the sum of $500, with interest from the time of the payment of the note by the

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indorser, and assessed damages and ordered judgment accordingly. The defendant alleged exceptions.

M. G. B. Swift, for the defendant.

J. W. Cummings, for the plaintiff.

FIELD, J. The fraudulent representations found by the court to have been made by the defendant were such that the plaintiff could maintain an action of tort in the nature of deceit to recover all damages suffered by reason of the representations; or he could, on discovering that the representations were false, rescind the sale, if he were able to put the defendant *in statu quo*, and could then recover the value of the consideration given by him. The consideration given was his promissory note, indorsed by Elihu Grant. The note was transferred by the defendant, before maturity, for value, to an innocent purchaser, to whom Elihu Grant paid it. It must be assumed from the exceptions that Elihu Grant indorsed the note at the request of the plaintiff, and that his payment of it was a payment made for the benefit of the plaintiff, and that Elihu Grant can recover of the plaintiff the amount paid, with interest from the time of payment. As this payment was made for and in behalf of the plaintiff, the damages are the same as if the plaintiff had himself made the payment. The court must have found, either that the sale had been rescinded, or that the property actually transferred to the plaintiff was of no value, and that, if the representations had been true, the property bought would have been of the value paid for it. On either finding, the rule of damages was substantially correct. *Exceptions overruled.*

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CLARA E. ELLIS, administratrix, *vs.* ATLANTIC AND PACIFIC RAILROAD COMPANY.

Bristol. Oct. 26, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

An appeal lies to this court from an order of the Superior Court, granting a petition for the removal of an action to the Circuit Court of the United States.

Section 639 of the U. S. Rev. Sts. provides that, upon certain conditions, an action commenced in a state court may be removed to the Circuit Court of the United States for the district where the action is pending, "next to be held after the filing of the petition for such removal;" and that "in order to such removal, the petitioner must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him." The bond filed with a petition for the removal of an action contained the condition that the petitioner "shall enter in such Circuit Court, on the first day of its session next after the granting of said petition, a copy of the record." The next session of the Circuit Court for the district, held after the granting of the petition, was the session next held after the filing of the petition. *Held*, that the variation in the form of the bond from the words of the statute was immaterial.

TORT against a corporation alleged in the writ to be established under the laws of the United States, for an injury sustained by the plaintiff's intestate, an employee of the corporation, by the defective condition of its road-bed. The writ was dated April 1, 1882, and returnable to the Superior Court next to be holden on the first Monday of June. The *ad damnum* was stated in the writ at $25,000.

On June 14, 1882, the defendant filed a petition for the removal of the case into the Circuit Court of the United States "next to be holden within and for the District of Massachusetts," alleging that the defendant was a corporation incorporated under a law of the United States, and was not a banking corporation, and that the plaintiff resided in New Bedford in the county of Bristol; that the matter in dispute, exclusive of costs, exceeded the sum of $500; that the defendant had a good and valid defence to said action under and by virtue of a law of the United States, namely, its act of incorporation of July 27, 1866, and other laws of the United States relating to said

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corporation. The petition was verified by the oath of the president of the corporation. On the same day the defendant filed a bond, with two sureties, in the sum of $500, which contained the following condition: "The condition of this obligation is such, that whereas heretofore, to wit, on the first day of April last, said Clara E. Ellis, administratrix, commenced an action at law against said Atlantic and Pacific Railroad Company, which action is returnable to the Superior Court of the Commonwealth of Massachusetts for the county of Bristol, at the June term thereof A. D. 1882, and said defendant being a corporation incorporated and organized under the laws of the United States, and having a defence to said action arising under and by virtue of a law of the United States, as it has duly declared under oath as required by law of the United States, desires and has petitioned the court for the removal of said action to the Circuit Court of the United States for the District of Massachusetts: Now therefore, if the above bounden party defendant in said action shall enter in such Circuit Court, on the first day of its session next after the granting of said petition, a copy of the record in said suit, and shall pay all costs that may be awarded by said Circuit Court, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear in said suit, then this obligation shall be void, otherwise shall remain in full force and virtue."

On July 11, 1882, the Superior Court granted the petition; and the plaintiff appealed to this court.

T. M. Stetson, for the plaintiff.

G. Marston, for the defendant.

FIELD, J. The petition for removal was filed in the Superior Court on June 14, 1882, and was allowed by that court on July 11, 1882. From the order allowing this petition the plaintiff appeals to this court. It does not appear that any rulings were requested of the presiding justice of the Superior Court, or that any exceptions were taken to any rulings made by him. Two questions have been argued in this court: first, whether an appeal lies to this court from the order of the Superior Court granting the petition; and second, whether the defect in the condition of the bond is a reason why the petition should not be granted.

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It is said that all questions of law which have been brought to this court by any party dissatisfied with an order of the Superior Court, or of a justice of this court, refusing or granting a petition for the removal of a cause to the Circuit Court of the United States, have been brought here either by exceptions or by report. *Bryant* v. *Rich*, 106 Mass. 180, 191. *Commonwealth* v. *Casey*, 12 Allen, 214. *Morton* v. *Mutual Life Ins. Co.* 105 Mass. 141. *Du Vivier* v. *Hopkins*, 116 Mass. 125. *Tapley* v. *Martin*, 116 Mass. 275. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 110 Mass. 70. *Stone* v. *Sargent*, 129 Mass. 503. *Mahone* v. *Manchester & Lawrence Railroad*, 111 Mass. 72. *Broadway National Bank* v. *Adams*, 130 Mass. 431. *Danvers Savings Bank* v. *Thompson*, 130 Mass. 490.

This court has jurisdiction of "questions of law on exceptions, on appeals from the Superior Court, on cases stated by the parties, and on special verdicts," &c. Pub. Sts. *c.* 150, § 7. In regard to appeals from the Superior Court, it is provided that "a party aggrieved by a judgment founded upon matter of law apparent on the record in any proceeding, civil or criminal, except a judgment upon an answer or plea in abatement or motion to dismiss for defect of form of process, may appeal therefrom to the Supreme Judicial Court," &c. Pub. Sts. *c.* 152, § 10. Before the appeal can be entered in this court, there must first be a final disposition of the whole case in the Superior Court. *Riley* v. *Farnsworth*, 116 Mass. 223.

It is obvious that an order or judgment of the Superior Court, refusing to grant a petition for the removal of an action to the Circuit Court of the United States, is not a final judgment disposing of the whole case in the Superior Court. The case still remains in the Superior Court, to be determined there. But an order allowing such a petition, and removing the cause, does dispose of the whole case in the Superior Court. Nothing more remains to be done in that court. From such an order, made upon allegations of fact as they appear of record as a final judgment in the cause, an appeal lies immediately to this court. The distinction is similar to that made between an order dismissing an action for matter of law apparent on the record, and an order refusing to dismiss it. *Lamphear* v. *Lamprey*, 4 Mass. 107. *Bowler* v. *Palmer*, 2 Gray, 553.

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Section 640 of the U. S. Rev. Sts., within which this case falls, provides that "such removal, in all other respects, shall be governed by the provisions of the preceding section." The preceding section provides that, "in order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him," &c., and "it shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause," &c. The first day of the session of the Circuit Court must, by reference to the first clause of the section, be held to mean the first day of "the Circuit Court for the district where such suit is pending next to be held after the filing of the petition," &c. The condition of the bond filed in this case is that the defendant "shall enter in such Circuit Court on the first day of its session next after the granting of said petition a copy of the record," &c. The form of the bond indicates that it was intended to conform to the provisions of the U. S. St. of March 3, 1875, § 3, and not to the provisions of the U. S. Rev. Sts. § 639; but the only objection taken is to the words above cited. But by the U. S. St. of March 3, 1875, § 3, as we construe it, a case should be entered on the first day of the session of the Circuit Court next to be held after the filing of the petition, in the same manner as a case removed under the U. S. Rev. Sts. § 640. It is however within the judicial discretion of the Circuit Court to permit a case so removed to be entered therein at a subsequent time, if sufficient cause is shown therefor. *Railroad Co.* v. *Koontz*, 104 U. S. 5.

It does not distinctly appear in this case that the bond was approved by the presiding justice of the Superior Court. Neither does it appear that the attention of the court was called to the peculiar form of the bond, and that the plaintiff either excepted to, or appealed from, any order of the Superior Court approving the bond; but if it be assumed that the Superior Court did approve the bond, as the parties in argument concede, and also assumed that it is open to the plaintiff, under his appeal from the order allowing the petition, to contest here the sufficiency of the form of the bond filed in the Superior Court,

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we are of opinion that the Superior Court might properly have held that the bond was of the same legal effect as a bond which followed literally the words of the statute; because the next Circuit Court of the United States for the District of Massachusetts held after the granting of the petition was the court next held after the filing of the petition, viz. the Circuit Court held on October 15, 1882. The bond was filed in the Superior Court with the petition for removal addressed to that court. If the bond were approved by that court, it was done at the time of granting that petition, and it took effect as of that time. The words of the bond, viz. "next after the granting of said petition," construed in reference to the petition, must be held to mean after the granting of the petition by that court, and it would appear of record in that court that the Circuit Court of the United States next to be held after the granting of the petition must necessarily be the session of the Circuit Court next to be held after the filing of the petition. The variation in the form of the bond from the words of the statute was therefore immaterial.

No answer by the defendant has been filed, and it does not appear what the defence is, except by the general allegation of the petition that the defendant has a defence arising under the laws of the United States in relation to it. The question has not been raised by the plaintiff which was decided one way in *Turton* v. *Union Pacific Railroad*, 3 Dill. 366, and the opposite way in *Magee* v. *Union Pacific Railroad*, 2 Sawyer, 447, and has not been considered. The order of the Superior Court removing the cause must be *Affirmed.*

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WILLIAM H. WHITWELL *vs.* ISAIAH B. WINSLOW & another.

Bristol. Oct. 27, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action upon a non-negotiable promissory note, signed by the defendant and payable to a third person or bearer, the plaintiff offered to show that, when the defendant gave him the note, he told the defendant it should be in his name or to his order, and that the defendant replied, "It is all right, it makes no difference, it is payable to bearer and you can collect." *Held*, that the evidence was inadmissible to vary the legal effect of the instrument; and that it could not operate as an estoppel to prevent the defendant from contending that the plaintiff could not maintain an action on the instrument in his own name.

A promissory note for a certain amount, payable to a person named or bearer, "with interest the same as savings banks pay," is not negotiable.

In an action for money lent to the defendant by the plaintiff, it appeared that the defendant had a large sum of money belonging to A., and that A. gave an order to the plaintiff on the defendant, which stated that A. had made arrangements with the plaintiff to settle up his affairs; that the defendant was to have a certain sum and the balance was to be in the plaintiff's name as he should see fit. The plaintiff testified that the defendant paid over to him the money mentioned in the order, and that he lent a portion of it to the defendant. The defendant was afterwards appointed executor of A.'s will. *Held*, that the action could not be maintained.

CONTRACT, against Isaiah B. Winslow and Frederick Winslow, upon the following instrument, signed by the first-named defendant and indorsed by the other defendant: "Fall River, June 29, 1872. For value received I promise to pay to Elijah Pierce or bearer five hundred dollars with interest the same as savings banks pay." Writ dated August 7, 1877. Isaiah B. was defaulted, and Frederick, who alone defended, answered, admitting his signature on the back of the instrument declared on, but denying that he made the instrument either by himself or with Isaiah B., or that he had any notice of its non-payment, or that he was liable therefor; and alleged that the instrument was not the property of the plaintiff, and that he held it wrongfully and had no right to maintain this action thereon; and that the instrument belonged to the estate of Elijah Pierce, the payee, and, as executor of the will of Pierce, the defendant was entitled to the instrument.

After the former decision, reported 132 Mass. 307, the case was tried in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows:

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The plaintiff offered the instrument declared on in evidence, and the defendant asked the judge to rule that the instrument was not a promissory note; and that, if it was, it was not negotiable, and the plaintiff could not maintain an action thereon in his own name. The plaintiff contended that this defence was not open under the pleadings; and offered to show that, when Frederick Winslow gave the instrument to the plaintiff, the plaintiff told him it should be in his name or to his order, and that Frederick replied, "It is all right, it makes no difference, it is payable to bearer and you can collect." But the judge ruled that the instrument was not negotiable; that the plaintiff could not maintain an action in his own name thereon; that the defence was open under the pleadings; and that the offer of evidence by the plaintiff was incompetent and immaterial; and the plaintiff excepted. The plaintiff thereupon amended his declaration by adding a second count for money lent.

The plaintiff testified that Elijah Pierce, the payee named in the instrument, was his grandfather; that he saw him in June 1872; that at that time the defendant Frederick had a large sum of money belonging to Pierce, and Pierce told the plaintiff that he should let Frederick have a thousand dollars, Abraham Pierce a thousand dollars, and the balance was to be in the plaintiff's name as he should see fit; that thereupon Pierce gave the following order to the plaintiff on the defendant Frederick: "Little Compton, June 22d, 1872. Frederick. I have made arrangements with Henry to settle up my affairs in Fall River about that money as follows: you will hold a book for $1000, and Abraham Pierce in Myricksville a book for $1000, and the balance will be Henry's name as he shall see fit. He will be authorized to pay all my bills and to take receipts for the same. Easton & Milne is hereby notified to pay the money over to him. Elijah Pierce."

The plaintiff further testified that he was the person meant by "Henry;" that he presented the order to the defendant, who paid over all the money in his hands except the $1000 he was to have; that the plaintiff then gave to the defendant $500 of his own money as a loan; that Pierce told him that he had agreed to let Frederick have $500 for Isaiah, but that the plaintiff could do as he thought best, and that Pierce would like to

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have him accommodate Frederick. On cross-examination, the plaintiff testified that the order substantially expressed all that was said between him and Pierce about the money; that no demand had ever been made on him for the note or money by Pierce, or any one in his behalf, and that Pierce died in 1877; that the plaintiff had used a part of the money, had deposited the rest in his own name, and had let Pierce have in all $700 from time to time; that at the time when the money was paid over to him by Frederick he gave him the following receipt: "$3890.00. Fall River, June 25th, 1872. Received of Frederick Winslow three thousand eight hundred and ninety dollars belonging to Elijah Pierce of Little Compton in compliance with his order. William H. Whitwell;" that the whole amount in Frederick's hands belonging to Pierce was $4390; that the $500 was not taken out by Frederick before the receipt was given, and before the money was handed to him by Frederick, and that he could not explain how the receipt came to be for $3890; that no gift of the money or note was made to him by Pierce except so far as the order gave it; that the order was written by him at Pierce's dictation; and that Pierce told him that Frederick was to have $1000, Abraham Pierce was to have $1000, and, if he saw fit, to let Frederick have $500 for Isaiah, and the balance was to be in his name as he saw fit.

The defendant offered no evidence; and asked the judge to rule that the plaintiff had not made out his case, and there was nothing to go to the jury. The judge so ruled, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

H. K. Braley, for the plaintiff.

J. M. Morton, for the defendant.

FIELD, J. The exception, that it was not open, under the pleadings, to the defendant to contend that the instrument declared on was not negotiable, was waived at the argument.

The rejection of the evidence of what Frederick Winslow said to the plaintiff at the time he gave the note to him, so far as it was offered for the purpose of varying the legal effect of the instrument, was right. Neither could the evidence offered, if true, operate as an estoppel to prevent Frederick from contending that the plaintiff could not maintain in his own name an action on the instrument. If the statement made by Frederick

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was false, and was made by him with the intention that the plaintiff should act upon it, and the plaintiff was thereby induced to accept the instrument, still it was a statement of an opinion upon a question of law, where the facts were equally well known to both parties.

The instrument declared on is a promise to pay Elijah Peirce, or bearer, five hundred dollars "with interest the same as savings banks pay." It is in form a negotiable promissory note, but the defendant contends that it is not such a note, because the words "with interest the same as savings banks pay" render the sum to be paid uncertain. The instrument is in effect payable on demand, and is not made payable at any particular place. Either the words "with interest the same as savings banks pay" must be considered too uncertain in meaning to constitute a contract, or it must be determined, either by construction or by evidence, or by both, what savings banks were intended by the parties; and it must be shown by evidence what rate of interest was paid by these savings banks during the time interest was payable on the instrument. If it be assumed that the savings banks intended were either the savings banks in Fall River, where the instrument was dated, or the savings banks in Massachusetts generally, it may be found that all the savings banks either in Massachusetts or in Fall River have not during the period mentioned paid the same rate of interest, and that perhaps each bank has not at all times during that period paid uniformly one rate of interest. The ordinary dividends of savings banks in this Commonwealth are paid out of their income, after deducting their reasonable expenses. These dividends are now regulated by the Pub. Sts. *c.* 116, §§ 24–28; and, at the time the instrument in suit was given, were regulated by the Gen. Sts. *c.* 57, § 147. See St. 1876, *c.* 203, §§ 14–17. The maximum rate of ordinary dividends is now prescribed by statute, but, within this maximum, the rate actually paid must depend upon the income of each bank. There is therefore no certainty in a promise to pay interest at the rate of the dividends of savings banks in Massachusetts generally; or in a promise to pay interest at the rate of the dividends of the savings banks in Fall River, if there be more than one savings bank there; unless it be shown by evidence that the rates of interest of all the banks which were intended by the parties

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have been the same during the whole period for which interest is to be computed. If the rates of interest paid by these banks have been different during this period, it becomes impossible to determine what rate of interest was intended by the promise to pay interest the same as savings banks pay. It is therefore uncertain whether this promise can be made certain by any evidence. Such a promise has not on the face of the instrument that degree of certainty in regard to the amount of money to be paid which is requisite to constitute a negotiable promissory note.

The evidence recited in the exceptions was not sufficient to warrant the jury in finding a verdict for the plaintiff upon the second count for money lent. The evidence tends to show that, if the money was lent, it was lent by the authority of Elijah Pierce, and was his money; and that, if any debt is due, it is due to his estate; and the defendant is executor of his will. The rulings of the presiding justice were correct.

Exceptions overruled.

JESSE ALLEN *vs.* ANDREW R. WRIGHT.
JOSEPH D. ALLEN *vs.* THOMAS S. BUTMAN.
JESSE ALLEN *vs.* SAME.

Bristol. Oct. 24, 1882. — March 5, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

An attachment of mortgaged personal property in the possession of the mortgagor is invalid, if the mortgagee, summoned as trustee, under the Gen. Sts. c. 123, § 67, is a resident of another State, and has no usual place of business in this Commonwealth.

The mortgagee of goods attached, while in the possession of the mortgagor, by an invalid attachment, may maintain replevin against the attaching officer.

Money held under an invalid attachment may be recovered of the attaching officer in an action for money had and received.

THE FIRST CASE was an action of tort against the sheriff of Bristol for the acts of his deputy, Thomas S. Butman, in attaching and keeping possession of the plaintiff's goods. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

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The facts, so far as material to the point decided, appear in the opinion.

THE SECOND CASE was an action of replevin of certain personal property. The defendant, a deputy sheriff, justified under the same attachment which was the subject of the first case. At the trial in the Superior Court, without a jury, *Brigham*, C. J., ruled that the action could not be maintained, and ordered judgment for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

THE THIRD CASE was an action of contract for money had and received. The defendant, a deputy sheriff, justified under the same attachment under which he justified in the preceding cases. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, it appeared that the money sued for was received by a keeper placed in the plaintiff's shop by the defendant, in payment of goods sold after an attachment thereof by the defendant, and was paid by the keeper to the defendant, who attached it, together with the goods first attached, by a second attachment.

The judge ruled that the action could not be maintained; and ordered judgment for the defendant. The plaintiff alleged exceptions.

The three cases were argued together, by *W. C. Parker*, for the plaintiffs; and by *H. M. Knowlton*, (*T. F. Desmond* with him,) for the defendants.

MORTON, C. J. In the first case, we are of opinion that the ruling of the Superior Court, that the second attachment made by the defendant's deputy was valid, was erroneous. This attachment was made on January 31, 1881, upon a trustee process, in which Joseph D. Allen, the mortgagee of the goods attached, was summoned as trustee; he was described as "of Little Compton in the State of Rhode Island, mortgagee of said Jesse Allen." There was no allegation that he had a usual place of business in this Commonwealth.

The statute provides that "personal property of a debtor subject to a mortgage, and being in the possession of the mortgagor, may be attached in the same manner as if it was unencumbered; and the mortgagee or his assigns may be summoned in the same action in which the property is attached, as the trustee of the

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mortgagor or his assigns, to answer such questions as may be put to him or them by the court or their order touching the consideration of the mortgage and the amount due thereon." Gen. Sts. *c.* 123, § 67. Pub. Sts. *c.* 161, § 79.

Before this provision was enacted, by the St. of 1844, *c.* 148, a creditor had two modes in which he might attach mortgaged personal property. He could attach it in the same manner as if it were unencumbered, provided he paid to the mortgagee the amount for which it was liable, within the time prescribed by law, after due demand; or, if the property was in the possession of the mortgagee, he could summon him as the trustee of the mortgagor by the trustee process. The object of the St. of 1844 was to extend the trustee process to the case where the mortgaged property is not in the possession of the mortgagee, but remains in the hands of the mortgagor. It gave the creditor the option in such case to attach the property by a writ of summons and attachment, or to resort to the trustee process. If he adopts the latter course, he does so subject to the rules of law which regulate the trustee process. It was not intended to give a new process, or to alter the old process of foreign attachment, except to extend its operation to the case where the mortgaged property was not in the manual possession of the mortgagee. This was so held in *Kent* v. *Lee*, 9 Gray, 45, where a process under the St. of 1844, *c.* 148, § 2, was dismissed because it was served by a separate summons, as in the ordinary case of an attachment of goods, instead of being served as the law directed for the service of a trustee process. If the Legislature had intended to change the trustee process and make non-resident mortgagees liable to be summoned as trustees, it would undoubtedly have made provision for service upon or notice to them, as it has carefully done in reference to absent defendants. The omission to do this is a significant indication that such was not its intention.

In the case at bar, therefore, as the attaching creditor elected to bring a trustee process, his action must be governed by the rules of law which regulate such process.

It has long been held that a resident and inhabitant of another State is not within the jurisdiction of our courts so as to be liable to be summoned as a trustee, although he is found

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here and served with process, and even although the property sought to be held was assigned to him in this State under a common law assignment for the benefit of creditors. *Tingley* v. *Bateman*, 10 Mass. 343. *Ray* v. *Underwood*, 3 Pick. 302. *Hart* v. *Anthony*, 15 Pick. 445. *Danforth* v. *Penny*, 3 Met. 564.

Recent legislation has extended the law so that non-residents who have a usual place of business within this Commonwealth are liable to the trustee process; but the statutes in force when this attachment was made clearly imply that no person who is not insolvent can be summoned as trustee, unless he has a usual place of business in the Commonwealth. Gen. Sts. *c.* 142, § 1. St. 1870, *c.* 194. See also Pub. Sts. *c.* 183, § 1.

In the case before us, the trustee was alleged to be and was an inhabitant of Rhode Island, having no usual place of business in this Commonwealth. The creditor's action being by trustee process, the attachment made therein was invalid. *Porter* v. *Warren*, 119 Mass. 535.

In the second case, having decided that the attachment under which the defendant justifies was invalid, it follows that the plaintiff, holding a mortgage of the attached goods, which is admitted to be valid, is entitled to maintain this action. *Boynton* v. *Warren*, 99 Mass. 172.

The question argued by the defendant, as to what might be the effect of a judgment charging the trustee in the suit in which he attached the property, is not before us, as no such judgment has been rendered.

In the third case, we can see no ground upon which the defence can be maintained, except the ground set up in the answer, that the defendant legally attached the money sued for, and holds it by virtue of such attachment. But as we have decided that the attachment by virtue of which he claims to hold it was illegal and invalid, it follows that the defendant has in his hands, without right, money which belongs to the plaintiff. To recover this, an action of contract for money had and received is a proper remedy.

The result is, that in each case the entry must be

Exceptions sustained.

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MAURICE FLYNN *vs.* CITY OF SALEM.

Essex. Nov. 8, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A person employed by a city to superintend the digging of a trench, and a person employed as a laborer to dig the trench by the same master, are *prima facie* fellow servants; and, to maintain an action against the city for personal injuries occasioned to the laborer by the negligence of the superintendent, the declaration must allege facts, the legal effect of which is that they are not such fellow servants.

TORT. The declaration was as follows: "And the plaintiff says that he was employed by the defendant to assist in digging a trench in one of the public streets in said city, to wit, in Dodge Street, which trench was opened by said defendant, in the exercise of its rights and in pursuance of its duty, for public and municipal purposes. And he says that while he was so employed, and while in the exercise of due care, the side of said trench caved in and fell upon the plaintiff, and buried him up in earth and clay, and inflicted severe personal injury upon him. And he further says that the defendant was guilty of negligence in the premises, and that the superintendent of said work, who was the agent of the defendant for that purpose, directed and required the plaintiff to dig in said trench, and in a part of the same in which it was dangerous and unsafe for him to be and to dig; and that said superintendent, being agent as aforesaid, when he required the plaintiff to dig in said trench as aforesaid, well knew and had reason to know that the place in which he required the plaintiff to dig in said trench was dangerous and unsafe, and that the sides of said trench were likely to cave in and injure persons working and digging therein; and that the said superintendent negligently failed to warn and inform said plaintiff that the place in which he required the plaintiff to work was dangerous, or that the sides of said trench were likely to cave in and injure persons working therein. And he says that he was wholly ignorant of the danger which he incurred by working where he was so directed, and that he was injured solely by reason of the negligence of said defendant in requiring and employing him to work in a dangerous place, where he was

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likely to be injured, without giving him any notice of such danger."

The answer contained a general denial, and also a demurrer to the declaration for the following reasons: "Because it does not set forth a legal cause of action against said defendant; because it appears that the alleged negligence was that of a fellow servant of the plaintiff; and because it is not alleged that the defendant's superintendent either knew or had reasonable cause to know that the plaintiff was ignorant of the alleged danger."

The Superior Court overruled the demurrer; the jury returned a verdict for the plaintiff; and the defendant appealed to this court.

S. B. Ives, Jr., (*H. P. Moulton* with him,) for the plaintiff.

J. A. Gillis, for the defendant.

FIELD, J. The declaration alleges "that the defendant was guilty of negligence in the premises," but the only negligence specifically set out is the negligence of the "superintendent of said work, who was the agent of the defendant for that purpose." The declaration does not clearly show for what purpose the trench was being dug, whether the superintendent was an officer of the city or not, or what his duties were. *Prima facie*, a person employed to superintend the digging of a trench is a fellow servant with the laborer employed to dig it, when the superintendent and the laborer are employed by the same master. *Zeigler* v. *Day*, 123 Mass. 152. *Johnson* v. *Boston*, 118 Mass. 114. *O'Connor* v. *Roberts*, 120 Mass. 227. *Killea* v. *Faxon*, 125 Mass. 485.

If there were any facts, of which the legal effect was that the superintendent and laborer were not fellow servants, they should have been stated in the declaration.

Judgment and verdict set aside, and demurrer sustained.

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ANN A. KNAPP *vs.* MARY S. KNAPP, executrix.

Essex. Nov. 9, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

Scire facias, issued by this court, is an appropriate process to obtain execution against the estate of a deceased person in the hands of his executor, for arrears of alimony awarded by a decree of this court to the plaintiff against the testator in his lifetime.

The provision of the Gen. Sts. c. 155, § 23, that decrees of courts of record "shall be presumed to be paid and satisfied at the expiration of twenty years" after the rendition thereof, does not operate as an absolute bar to a writ of *scire facias* on such a decree; but the presumption may be rebutted by evidence showing that the decree has not in fact been satisfied.

On a writ of *scire facias* against the executor of the estate of a person to recover arrears of alimony, execution does not necessarily issue for the full amount found to be due and unpaid at the time of the death of the testator; but the court has discretion, on the facts proved, to determine for what sum the decree for alimony shall be enforced by an execution against his estate.

SCIRE FACIAS. The writ, dated July 11, 1881, and returnable to this court, alleged that the plaintiff, in April 1853, was granted by this court an absolute divorce from the bonds of matrimony from Isaac N. Knapp, and was allowed the sum of $200 by the year as her reasonable alimony, to be paid to her by Isaac N. Knapp in quarterly payments, to be computed from April 27, 1853; that, at a term of this court held in May 1855, it was considered by the court that the alimony of the plaintiff be increased to $250 a year, to be paid to her by Isaac N. Knapp in quarterly payments, the first quarter to be computed from and after April 27, 1855; and decrees to the said effect were duly entered, "whereof the said Isaac N. Knapp is convict, as to us appears of record;" that although said decrees were entered, yet no portion of the same had yet been paid or satisfied; that Isaac N. Knapp died, October 25, 1879, possessed of goods and estate, and leaving a will whereof the defendant was named as executrix, which will was, on December 21, 1879, duly admitted to probate in this Commonwealth, and the defendant was appointed executrix, and duly gave bond as such, which was approved by the court; that the said executrix had, although a year and more had elapsed since said appointment and qualification, failed to pay said arrears of alimony, but refused to pay the same, or any part of the same.

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The defendant moved to dismiss the writ, for the reason that the writ could not be maintained against the defendant, on any facts set forth therein; and because no order for payment of arrears of alimony ought to be issued on a proceeding begun after the death of the defendant's testator.

Devens, J., ordered the writ to be dismissed; and the plaintiff appealed to the full court.

D. L. Withington, for the plaintiff.

S. Snow, for the defendant.

FIELD, J. Although an action of contract on the judgment is the remedy commonly used in this Commonwealth, still a writ of *scire facias* is an appropriate process to obtain execution against the estate of a deceased judgment debtor in the hands of his executor or administrator. *Heapy* v. *Parris*, 6 T. R. 368. *Bragner* v. *Langmead*, 7 T. R. 20. *Earl* v. *Brown*, 1 Wils. 302. *Hildreth* v. *Thompson*, 16 Mass. 191. *Jeffreson* v. *Morton*, 2 Wms. Saund. 12, n. *Wright* v. *Madocks*, 8 Q. B. 119. Com. Dig. Execution, F.

Scire facias was considered a proper process to enforce against the husband a decree for alimony. *Morton* v. *Morton*, 4 Cush. 518. In *Slade* v. *Slade*, 106 Mass. 499, it was held that *scire facias* was not the exclusive remedy against the husband to enforce a decree for alimony, and it was said that "a petition is usually preferable to a *scire facias*, because the proceeding is more speedy and flexible."

An execution in common form is the ordinary process to enforce such a decree for the payment of money, but the court may in a proper case issue an attachment for contempt, or any other appropriate process, in the same manner as decrees are enforced in equity. Gen. Sts. *c.* 107, §§ 45–53; *c.* 113, § 23. Pub. Sts. *c.* 146, §§ 33, 37; *c.* 151, § 29. In equity, if a suit abates by death, the ordinary process to revive it is a bill of revivor; but it seems that, if the suit abated by the death of the respondent after the decree has been signed and enrolled, the practice anciently was to revive the decree by a subpœna in the nature of a *scire facias*. Story Eq. Pl. § 366. The existing practice is now governed by the chancery rules 25 and 26, 104 Mass. 573, and by the statutes. See Pub. Sts. *c.* 165, § 19. Under these statutes and rules, a petition by the plaintiff in this cause might

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be an appropriate remedy, but we are of opinion that she is also entitled to a writ of *scire facias* from this court, where the record is.

Allen v. *Allen*, 100 Mass. 373, decides that, since the enactment of the statutory provisions which are still in force, an action of contract on a decree for alimony rendered in this Commonwealth cannot be maintained in the Superior Court; and it is said that "this court is the only one in this State competent to enforce payment of alimony decreed by itself." The court say that "the fact that, by the practice of divorce suits, such a decree in the court by which it is made will be revised and altered for due cause shown; made greater or less as the necessities of the wife have increased or diminished, or taken away altogether when she has been guilty of flagrant misconduct; together with the circumstance that arrears of alimony do not survive the death of the wife, and are incapable of enforcement by her executor or administrator, present forcible arguments against allowing on such a decree an action at common law, in which no modification of it can be made, but judgment must be given for or against it, as it stands." But if a writ of *scire facias* can be brought against the husband to obtain an execution against him for alimony, which, by a decree of the court, he has been ordered to pay, there is no good reason why the same process should not be used to enforce such a decree by obtaining execution against his estate for arrears of alimony due at the time of his death, if any right of action to obtain such arrears survives his death. A decree for alimony, whether for alimony already due, or to become due in the future, is in a certain sense a debt of record established by a judgment. As alimony out of the husband's property is a provision for the support of the wife by him, the obligation to pay it in the future necessarily ceases with the death of the husband, but amounts already due at the time of his death are in the nature of a debt then existing, and are payable out of his estate. *Smith* v. *Smith*, 1 Root, 349. *Wren* v. *Mosse*, 1 Gilman, 560.

Such arrears, however, are not absolute debts, but the decree for alimony may be revised and altered from time to time, on petition of either of the parties. Rev. Sts. *c.* 76, § 36. Gen. Sts. *c.* 107, § 47. Pub. Sts. *c.* 146, § 39.

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After the death of the husband, no execution can issue against him; but, if it issue at all, it must issue against his goods and estate in the hands of his executor or administrator, and the executor or administrator should be made a party, and *scire facias* is an appropriate process to bring in the executor or administrator. A *scire facias* brought for this purpose is not an original suit, but it is a continuation of the former suit, and is instituted in order to make the executor or administrator of the deceased debtor a party, and to obtain an execution to enforce the judgment or decree. It will be open to the executor or administrator, when thus brought in, to petition that the decree may be revised or altered, in the same manner as the husband, if living, could have done; and, as was said by the court in *Morton* v. *Morton*, *ubi supra*, "if there be any good ground to bar the plaintiff of her claim to one or more instalments of alimony alleged to be due, there will be full opportunity to plead and maintain it."

The writ is dated July 11, 1881, and alleges that Isaac N. Knapp died on October 25, 1879; that a decree was entered in April 1853, that he pay the plaintiff $200 a year, in quarterly payments from April 27, 1853, as her reasonable alimony; that in May 1855 it was considered by the court that the alimony be increased to $250 a year, to be paid in quarterly payments from April 27, 1855, "as to us appears of record;" and that no portion of the same had yet been paid or satisfied.

The provisions of the Rev. Sts. *c.* 120, § 24, (Gen. Sts. *c.* 155, § 23; Pub. Sts. *c.* 197, § 23,) that "every judgment and decree in any court of record of the United States, or of this or any other State, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered," has been held to be declaratory of the common law; and the presumption of payment "may always be rebutted by evidence showing that the same has not in fact been paid, but remains justly due." *Denny* v. *Eddy*, 22 Pick. 533.

As the decree in this case is in effect that Isaac N. Knapp, during the joint lives of himself and his wife, pay to her a certain sum of money in quarterly payments, this presumption would affect only those payments which by the decree were to be made more than twenty years before the date of this writ.

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This writ was brought after one year, and within two years, after the appointment of the defendant as executrix, and of her giving bond as such. Gen. Sts. *c.* 97, §§ 5, 16. Pub. Sts. *c.* 136, §§ 1, 9. There is no other statute of limitations applicable to a writ of *scire facias* brought for the purpose for which this was brought. The writ should not therefore have been dismissed on motion.

From the peculiar nature of a decree for alimony, and the right and power in the court to revise or alter it at any time, execution is not necessarily to issue for the full amount of arrears of alimony found to have been due and unpaid at the time of the death of the defendant's testator; but it is in the discretion of the court, on the facts that may be proved, to determine for what sum, if for anything, the decree for alimony shall be enforced by an execution against his estate. See *De Blaquiere* v. *De Blaquiere*, 3 Hagg. Eccl. 322. *Wilson* v. *Wilson*, 3 Hagg. Eccl. 329, note.

The order dismissing the writ must be reversed, the motion to dismiss it overruled, the defendant must plead, and the cause stand for hearing. *Ordered accordingly.*

ANN WOODS *vs.* NAUMKEAG STEAM COTTON COMPANY.

Essex. Nov. 9, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A landlord who lets tenements in a building to different tenants, with a right of way in common over a flight of stone steps, without a railing, leading from the street to the yard of the building, is not liable to a tenant injured by falling upon ice accumulated upon the steps, if it is not the landlord's duty to keep the steps clear of ice, although the steps are constructed of such material and in such a way as to occasion the accumulation of ice thereon, there being no change in the construction of the steps since the tenancy began.

TORT for personal injuries. Answer, a general denial. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions, in substance as follows:

The defendant admitted that, on February 26, 1879, it was the owner of a certain tenement house in Salem. The plaintiff

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introduced evidence tending to prove that said house was fitted for four families, and contained four tenements, one of which was, at the time of the plaintiff's injury, and since 1876 had been, occupied by the plaintiff with her husband and family, as tenants at will of the defendant; that there was a common entrance on one side of the house for all the tenants, this being the only entrance; that there was a yard adjoining the house, which was for the use of all the tenants, and which was from three to four feet higher than the level of the street; that the only means of passing to and from the yard and street, and of reaching the house, was by three steps leading down from the yard to the street; that the steps were of rough-split, unhewn granite, each of them being from ten inches to one foot in height and from eight to ten inches wide, and about three feet in width from side to side, and no railing had ever been placed on either side thereof.

The defendant admitted that the yard and steps were owned by it, and were for the use of all the tenants who might occupy its tenement house.

The plaintiff also introduced evidence tending to prove that none of the tenants had ever taken any care of said steps, and that there was no agreement between any of the tenants and the defendant as to the care, management or repair of the same; and there was no evidence that the defendant had ever exercised any such care, management or control, except so far as such care or control might be inferred from the evidence above stated, and never undertook to remove any snow or ice therefrom, or from any part of the premises, during the plaintiff's occupancy, from 1876 to the time of her injury.

The plaintiff also introduced evidence tending to prove that the steps, on the day of the injury, were filled and clogged up with snow and ice, accumulated thereon from natural causes, so that they were in a dangerous and unsafe condition, and had been in the same condition for seven or eight days prior thereto; that the structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury; that there was no change in their condition except that resulting from the accumulation of ice and snow; and that, at about eight o'clock in the morning of said

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day, the plaintiff, in attempting to pass down the steps, slipped upon the ice and snow accumulated on the steps, and received the injury complained of; and there was evidence tending to prove that, at the time the plaintiff was injured, she was in the exercise of due care. A view of the premises was taken by the jury.

The plaintiff contended that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of ice and snow thereon improperly, and so as to constitute an unsafe condition of the steps; and that such construction of the steps, and such accumulation of ice and snow allowed to remain thereon, and the defendant's omission to place a rail on either side of the steps, or to take other reasonable precautions to prevent one from falling, was such negligence as would render the defendant liable in this action.

At the close of the plaintiff's case, the defendant asked the judge to rule that there was no evidence to go to the jury, and that the action could not be maintained. The judge ruled as requested, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

F. L. Evans, for the plaintiff.

L. S. Tuckerman, for the defendant.

FIELD, J. The plaintiff was a tenant at will, or the wife of a tenant at will, of the defendant, and she used the steps in passing from the tenement occupied by her to the street, not by the invitation of the defendant, but in the exercise of her right to use the passageway in common with others for the purpose of entering and leaving the premises let to her or to her husband. If she were the sole tenant of the house and the yard, including the steps, the defendant would not be liable in this case. A tenant who hires premises takes them as they are, and cannot complain that they were not constructed differently. *Dutton* v. *Gerrish*, 9 Cush. 89. *Royce* v. *Guggenheim*, 106 Mass. 201, 202.

There may be cases in which the landlord is liable to the tenant for injuries received from secret defects, which are known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps. *Minor* v. *Sharon*, 112 Mass. 477.

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When different parts of a building are let to different tenants, with the right in the tenants of using in common the approaches and passageways, which are not let, but remain in the possession of the landlord, the landlord as owner and occupant is held liable to strangers who are rightfully using these passageways for all injuries received from defects in the construction, or from want of repair of the passageways. *Readman* v. *Conway*, 126 Mass. 374.

In *Looney* v. *McLean*, 129 Mass. 33, 35, the court say, that "where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portion, he still retains the responsibilities of a general owner to all persons, including the tenants of his building." In that case, the injury was received "in consequence of the giving way of one of the steps of the staircase." The court also say, that "the jury, under the instructions given, have found that she was injured, without fault on her part, while using a defective stairway apparently intended to furnish access to the roof of a shed used in common by the other tenants for drying clothes;" "and that there was nothing in their appearance which would indicate to a prudent person that they were unsafe." The case finds that "it was admitted that the defendant knew that the stairs were greatly decayed and unsafe." The defect there was that the steps had become unsafe by decay, and this defect was not apparent, was known to the defendant, and the plaintiff was not in fault. See *Ivay* v. *Hedges*, 9 Q. B. D. 80.

The case did not call for the determination of the question whether the liability of the landlord is in all respects the same to his tenants as to other persons for injuries received from defects in passageways which are used in common by the tenants, but over which the landlord retains control. It is the general rule that, when a person has a right of way over the land of another, the owner of the soil is not bound to keep the way in repair for the owner of the way, although the owner of the soil has no right to obstruct the way, or to dig pitfalls in it, and is

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liable for any defects in the way which he has caused. When the passageways are of artificial construction, as, for example, the halls and staircases of a house, and the owner lets part of the premises with the right in the tenants to use the passageways in common with others, it may be that there is an obligation on the owner to keep the ways in such a condition that they can be safely used by the tenants; but this obligation has never been extended so as to require a reconstruction of the ways on a different plan, if the ways as they existed when the premises were hired were not altogether convenient or safe by reason of some fault in the original plan which was apparent.

In the case at bar, there was no duty on the part of the defendant to the plaintiff to remove from the steps the ice and snow which naturally accumulated thereon. That was the tenant's duty, if she desired to use the steps. The ice and snow were the proximate cause of the injury.

The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended "that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of ice and snow thereon improperly." The steps were of rough-split, unhewn granite, and "the structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury." The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant.

Judgment on the verdict.

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CHARLES J. KIMBALL *vs.* WILLIAM S. MCINTOSH.

Essex. Nov. 9, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

Evidence that a son, after the death of his father, lived some of the time in a house with his mother at her request, occupying half of the house, but without any express agreement as to his occupation thereof, and some of the time in another house, both houses being set off to his mother as dower, with certain easements connected therewith, will not warrant a jury in finding that the son had such a right of possession as to entitle him to maintain an action against one interfering with the easements during the life of the mother.

TORT for obstructing a right of way. Trial in the Superior Court, before *Rockwell*, J., who reported the case for the determination of this court, in substance as follows:

The suit was originally brought by Lucy S. Kimball and the present plaintiff. Lucy S. died before trial, and her administrator declined to prosecute.

It was proved or admitted that Charles Kimball, the father of the plaintiff, owned a parcel of land in West Newbury, on which were two dwelling-houses, a barn, shed, and other buildings. At his death, dower was set off to Lucy S., his widow, on April 20, 1859, in one dwelling-house, with "the privilege to it and around it, to pass and repass as may be necessary in order to the full use and enjoyment of the same, and a right to the well by the house for water."

The heirs of Charles Kimball were the plaintiff and John R. Kimball. On June 24, 1859, John R. quitclaimed to the plaintiff all said parcel of land, subject to the dower as set off. On March 16, 1860, the plaintiff conveyed to John R. "one half interest undivided in the property set off as dower." On March 17, 1863, the guardian of the plaintiff petitioned the Probate Court for leave to sell all his ward's real estate. On April 7, 1863, a decree was made granting leave to sell the same; and on May 8, 1863, the guardian conveyed to one Chase the whole of said land, with the following reservations, "reserving the house occupied by Mrs. Kimball, with the privilege for the owners of said house to use the yard around said house equally with said grantee, also the same privilege in the yard front of the barn, also reserving the shed with the land under

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it on the easterly end of the barn, with the hennery near it." These are the yards over which the plaintiff claimed a right of way. On March 24, 1865, the guardian made return to the Probate Court that he had published notice of the sale on April 10, 1863. The description in the notice was as follows: "A farm situate on the main road in West Newbury, about one half-mile from Artichoke River and same distance from church. The farm contains about twenty-five acres of good land, good house, barn and other out-buildings. It was formerly owned by Charles Kimball, and is now owned by Charles J. Kimball. For further particulars apply to Newell Ordway, guardian." On September 11, 1869, Chase conveyed to the defendant all said parcel, without any reservation.

The plaintiff, after his father's death, lived in the house with his mother, Lucy S., for some years, and then moved into the other house, now that of the defendant, and lived there until the sale to Chase. He then moved into the house with his mother again, without any express agreement as to his occupation thereof, and has lived there ever since, occupying one half the house, and his mother occupying the other half. Some seven years before this action, he talked about going elsewhere to live, but his mother said she wanted him to remain there and take care of her as long as she lived. From the time of the deed to Chase until Chase sold to the defendant, the other house was unoccupied. When the defendant came into possession, or shortly after, he put up the obstructions complained of.

The plaintiff testified that his mother used the part of the yard around the house, now separated from the rest of the yard by a fence across the southerly part and a small building, (two of the obstructions complained of,) to lay wood upon and the like, whenever she had occasion, after the death of his father, as that part of the yard had before been used, but he could not remember whether she used it after the conveyance to Chase or not; and that she always occupied the shed and the hennery as long as it stood.

Upon these facts, the judge ruled that the plaintiff could not maintain this action; and directed a verdict for the defendant. If the ruling was correct, the verdict was to stand; otherwise, a new trial to be ordered.

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H. I. Bartlett, for the plaintiff.

D. L. Withington, for the defendant.

FIELD, J. The easements, the obstruction of which is complained of in this action, were either appurtenant to the life estate of the widow, or were appurtenant to the land in which she had a life estate. The plaintiff was tenant in common with John R. Kimball of the reversion, subject to the life estate of his mother. The obstructions complained of do not appear to be an injury to the reversion, and the plaintiff does not sue as owner of the reversion. The plaintiff had no estate in possession during the life of his mother, unless he received one from her. No evidence appears in the exceptions which would warrant the jury in finding that he had become a tenant in possession of any part of the premises. He seems to have occupied by the permission or at the request of his mother, but "without any express agreement as to his occupation thereof." The evidence does not tend to show that there was any agreement, express or implied, between him and his mother, whereby he acquired the estate of a tenant at will. *Judgment on the verdict.*

JOHN HALEY *vs.* CATHARINE YOUNG.

Essex. Nov. 10, 1882. — March 2, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If the last day of the three years limited by the Gen. Sts. c. 140, § 1, for the redemption of land from a mortgage, falls on Sunday, a tender of the amount due on the mortgage upon the following day is too late.

BILL IN EQUITY to redeem land from a mortgage. At the hearing, the bill was dismissed, with costs; and the plaintiff appealed to the full court. The facts appear in the opinion.

C. U. Bell, for the plaintiff.

C. A. DeCourcy, for the defendant.

FIELD, J. The decree from which an appeal was taken recites that "this case came on to be heard upon bill and answer," and thereupon the bill was dismissed, with costs. The papers

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disclose a plea and answer. The plea is to the whole bill, and the answer does not purport to be in support of the plea. It does not appear that the plea was ever set down for hearing, and was either allowed, overruled, or ordered to stand for an answer; but, as the answer purports to answer the whole bill as a defence, it was probably considered that the defendant in filing it waived his plea; although it is possible that the plea may have been considered as an answer, and the answer as filed in support of the plea.

The bill alleges that, on February 19, 1879, the defendant "entered upon said premises for the purpose of foreclosure, and filed a certificate thereof in the registry of deeds for said county, which said foreclosure would be complete on the 19th day of February 1882;" and that "during the time limited for redemption the plaintiff has tendered the said defendant the amount due her on said mortgage, and asked her to accept it in satisfaction of the same." The plea distinctly alleges that the foreclosure became absolute on February 19, 1882, and "that at no time prior to the 20th day of February, 1882, was any tender of the amount due on said mortgage, or any other sum, made to her by the plaintiff, or by any other person, nor was any demand or request made upon her for an account of rents or profits of the mortgaged premises, or of the amount due on the mortgage, nor had she any notice of any intention or desire on the part of the plaintiff, or of any person, to redeem the premises from said mortgage." The answer also alleges "that prior to the 20th day of February 1882, when the said foreclosure became complete by lapse of time, the defendant had no notice of any intention or desire on the part of the plaintiff, or of any other person, to redeem the premises from said mortgage, nor was any request or demand made upon her to render any account of the amount due thereon." The answer also sets forth the circumstances under which the defendant occupied the premises; and in effect denies the allegation of the bill, "that the said defendant, by taking the rents and profits of said premises as aforesaid, has satisfied to herself most if not all of the principal debt and interest of said mortgage."

In a hearing upon the bill and answer, the allegations of the answer must be taken to be true; and whether the plea be

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regarded as overruled by the answer, or as standing for an answer, it does not appear that the mortgage has been satisfied by the taking of the rents and profits; and it does appear that before February 20, 1882, no notice of an intention or desire to redeem the mortgage was given to the defendant, and no request upon her to render an account of the amount due was made, and it is conceded by the plaintiff that there was no tender of this amount before that day. By the Gen. Sts. *c.* 140, § 1, it is enacted that the possession obtained in either mode provided by the statute, if "continued peaceably for three years, shall forever foreclose the right of redemption."

In this case, the three years, if the day of entry is excluded, expired February 19, 1882, which was Sunday. The principal question which has been argued is whether a tender on Monday, February 20, 1882, would enable the plaintiff to maintain his bill under the Gen. Sts. *c.* 140, § 16. It is not contended that there has been any waiver of the entry to foreclose, or any agreement to extend the time of redemption, or that there are any equitable circumstances which would induce a court of equity to grant relief against a foreclosure which had become absolute. The ground taken is, that, because the three years of peaceable possession expired on Sunday, a tender on the following Monday is within the three years limited for redemption. It is said that, at common law, when the time for the performance of a contract according to its terms expires on Sunday, a performance on the following Monday is good. *Hammond* v. *American Ins. Co.* 10 Gray, 306. But this rule, whatever may be the extent of it, has not been applied to acts which by statute are required to be done within a time therein limited.

In *Cunningham* v. *Mahan*, 112 Mass. 58, the court say, "When a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited exceeds a week, Sunday is included in the computation; but if it is less than a week, Sunday is excluded. This is the established rule of computation in this State. *Alderman* v. *Phelps*, 15 Mass. 225. *Thayer* v. *Felt*, 4 Pick. 354. *Penniman* v. *Cole*, 8 Met. 496. *McIniffe* v. *Wheelock*, 1 Gray, 600. *Hannum* v. *Tourtellott*, 10 Allen, 494."

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In *Alderman* v. *Phelps*, *ubi supra*, the last day was Sunday. In *Cooley* v. *Cook*, 125 Mass. 406, the law is stated thus: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest."

In the case at bar, we think the foreclosure had become absolute before February 20, 1882; and that a tender on or after that day was too late. It is unnecessary to consider the other objections taken to the bill. *Decree affirmed.*

FREDERICK R. LEYLAND *vs.* HENRY E. PINGREE.

Suffolk. Nov. 20, 1882. — March 1, 1883. DEVENS & HOLMES, JJ., absent.

Under the 87th rule of the Superior Court, the mere handing to the judge presiding at the trial of written requests for instructions, does not necessarily imply that, if the requests are not granted, an exception is saved.

PETITION to establish the truth of exceptions alleged by Frederick R. Leyland in an action of tort brought against him by Henry E. Pingree, and disallowed by *Aldrich*, J.

The petition alleged, among other things, that, upon the trial of the case, the petitioner requested the presiding judge to instruct the jury that, upon all the evidence, the plaintiff could not maintain his action, and also presented to the judge certain requests in writing for rulings and instructions to the jury (which were set forth); that the said requests were handed to the judge by one of the petitioner's counsel, while the other was making his closing argument to the jury; that they were not shown to the plaintiff's counsel; that nothing was said about them to the counsel or to the jury by the judge; that the judge did not otherwise refuse to instruct the jury in accordance with said requests, than is to be implied from his omission, in the instructions actually given, to give the instructions requested or

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equivalent instructions; that no exception was otherwise saved in relation to said requests before the charge to the jury, or otherwise alleged before verdict, in respect to any omission to instruct the jury in accordance with said written requests.

The certificate of the judge attached to the bill of exceptions was as follows:

"The foregoing written requests for rulings were handed to the court by one of the defendant's counsel, while the other was making the closing argument to the jury; but they were not shown to the plaintiff's counsel, and they had no knowledge of them until after verdict. The court instructed the jury as stated in the defendant's bill of exceptions, but made no allusion to the defendant's written requests for rulings. No exceptions were taken to the instructions given, or to the omission to give others; nor were any questions or exceptions saved in relation to the defendant's written requests for rulings previous to the charge to the jury, or alleged before the jury were sent out, nor until after the rendition of the verdict. Upon this state of facts, I allow the defendant's exceptions to the refusal of the court to rule that the plaintiff could not, upon the evidence, maintain his action, and disallow all his other exceptions."

W. G. Russell & L. S. Dabney, for the petitioner. 1. The petitioner is entitled to have that portion of his bill of exceptions allowed which has been disallowed by the presiding judge, provided the same is truly alleged, unless, upon the facts alleged in his petition and stated in the certificate of the judge, the fair construction to be given to the 37th rule of the Superior Court * affords lawful ground for depriving him of this right. It is implied in the language of this rule that exceptions to the charge may be saved before the charge is given, because they are required to be alleged before the jury are sent out only in case they have not been previously saved. By the common understanding and practice under the rule, the method for previously

* This rule is as follows: "No exception shall be allowed by the presiding judge, unless the same be alleged and saved at the time when the opinion, ruling, direction or judgment excepted to is given. And all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out; and if not so alleged, the same shall not be allowed. All requests for instructions shall be made in writing."

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saving them has been to hand to the judge requests in writing for instructions. It is equivalent to saying to the judge, "I ask you thus to instruct the jury, and, if you do not, I wish to save an exception to your refusal." If the judge neither consents nor refuses in terms to instruct the jury as requested, an omission to give an instruction so requested, or equivalent instructions, is an implied refusal, and the exception to it is "previously saved" by the written request. The judge is not bound to consent or decline in terms to give the rulings requested. The refusal by implication is established only when the charge is concluded; and, unless the exception to such refusal is "previously saved" by the written request, it cannot be "previously saved" at all. The only remedy then for the party is to have the jury detained while he complains to the judge of his charge, and alleges exceptions to the judge's express or implied refusal to rule as he has asked, thereby making the jury certain that the charge is against him. By such a construction of the rule, no way of excepting to a refusal implied from an omission to charge in conformity with his written request is left to the party, save one which greatly diminishes the probability of a verdict in his favor. No decided case has established such construction, and the fair inference to be drawn from *Sawyer* v. *Yale Iron Works*, 116 Mass. 424, is in favor of the petitioner. Written requests for instructions are addressed and handed to the presiding judge. Whether they shall be submitted to the other party is a matter within the control of the judge, and not of the party making them.

2. The rule is not so clear, that, in the absence of authoritative construction, it ought to be allowed to deprive a party of an exception which he intended to take and supposed he had taken.

B. F. Butler, (*A. Cottrell* with him,) for the respondent.

MORTON, C. J. There is no dispute in this case that the facts are as stated in the certificate of the presiding justice of the Superior Court. At the trial, the defendant asked the court to rule that, upon the evidence, the plaintiff could not maintain his action. This ruling was refused, and an exception duly saved. One of the defendant's counsel, while the other was making his closing argument to the jury, handed to the presiding justice several written requests for rulings; they were not

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shown to the plaintiff's counsel, who had no knowledge of them until after the verdict. The judge, in charging the jury, gave instructions upon the subject matters embraced in the requests, but differing in language and in substance from the requests. The certificate states that "no exceptions were taken to the instructions given, or to the omission to give others; nor were any questions or exceptions saved in relation to the defendant's written requests for rulings previous to the charge to the jury, or alleged before the jury were sent out, nor until after the rendition of the verdict." The 37th rule of the Superior Court is binding upon a presiding judge, and he cannot properly allow any exceptions unless they are in some way alleged and saved in accordance with its requirements.

The form in which exceptions are saved is of no consequence. If expressly saved, of course they must be allowed. It very often happens in trials, that counsel and the judge understand that the purpose of the counsel is to save exceptions, although not alleged in express language. Whatever form may be used, if the counsel and the judge both understand that exceptions are saved, the judge may and should allow such exceptions under the rule. But, in the case before us, the presiding judge certifies that the exceptions sought to be proved were not alleged and saved at any time before the verdict of the jury. This imports that the judge did not understand, from what took place at the trial, that the defendant's counsel saved any exceptions except the one he has allowed. This certificate, not being controlled, is conclusive, unless the defendant can maintain the proposition that what took place at the trial was, as matter of law, a due saving and alleging of his exceptions.

The defendant contends that the mere handing to the judge of a written request for instructions necessarily implies that, if it is not granted, an exception is saved. We are not able to see why this act carries such an implication, any more than why the act of objecting to evidence implies an exception if it is admitted. It is the experience of every day in the trial of cases, that evidence is objected to, and admitted against the objection, but no exception is taken; in such case no exception is implied, and a judge cannot allow one, unless it is distinctly alleged. The objection furnishes ground for an exception. It

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is not in itself an exception. We think it is the same with written requests for instructions.

The object of the 37th rule is to require a party, if he objects to the charge and wishes to except to any part of it, either because it is not according to his requests or for any other reason, to allege his exceptions before the jury are sent out, either before or after the charge. This is a right of the judge. It often happens that a judge intends to give, in his own language, the substance of instructions requested, either in full, or with some modifications which are clearly right. If the parties take no exception, he has the right to assume that they are satisfied with the charge, on the other hand, if a party alleges an exception to it, it will often furnish an opportunity to correct any inadvertent expression or unintentional error. The opposite party has the right to have any exceptions so alleged that he may know what exceptions are taken. He can often, by concession, save some question of law, difficult and doubtful, but which has no practical importance in the case as it stands.

In the case before us, the defendant did, before the charge, allege one exception, which the presiding justice has allowed. We are of opinion that, if he intended to except to the charge because it did not conform to his requests for instructions, it was his duty in some form to allege exceptions, either before or after the charge; and that, not having done so, he cannot rely upon the exceptions which by this petition he seeks to prove.

The result is, that the petition must be dismissed, and the case must be heard upon the exceptions allowed by the presiding justice of the Superior Court. *Petition dismissed.*

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JOHN H. STURGIS *vs.* JONATHAN PRESTON.

Suffolk. Jan. 16. — March 1, 1883. FIELD & W. ALLEN, JJ., absent.

An action for money had and received, to recover money paid under a mistake of fact, in which there is no claim of fraudulent concealment, is barred by the statute of limitations, unless brought within six years from the date of the payment of the money; and no demand before bringing the action is necessary.

COLBURN, J. In this case, the plaintiff contended, and offered to prove, that in the year 1871 he bargained with the defendant for a lot of land, for a certain sum a square foot; that the defendant stated the number of square feet in the lot; that the plaintiff relied wholly upon the defendant's statement, and had no reason to believe or suspect that there was any error in said statement; that he thereupon paid for the land accordingly, and took a deed thereof; that there was not the number of square feet of land in said lot that the defendant had represented; that he did not discover the deficiency until the year 1880, a short time before this action was brought, when he was preparing to build upon the lot; that immediately upon the discovery of the mistake, he notified the defendant thereof, and demanded repayment of the sum so overpaid, and brought this action to recover it. The plaintiff disclaimed all charges of fraud or fraudulent concealment on the part of the defendant.

One of the counts in the plaintiff's declaration was for money had and received. The defendant relied, as one defence to the action, upon the statute of limitations.

The plaintiff contended that an action for money had and received has always been treated, at common law, as being founded on equity, and that the decision in this case, whatever it ought to be, should be the same, whether it should be considered a decision at common law or in equity; and argued that, as in equity, in cases of mistake, the statute of limitations does not begin to run until the discovery of the mistake, this action is not barred by that statute.

The answer to this argument is, that, although an action for money had and received, in its spirit and object, resembles a suit in equity, it is still an action at law, within the statute of

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limitations; and, as all charges of fraudulent concealment are disclaimed, it is not within any exception to the statute. Gen. Sts. *c.* 155, §§ 1, 12.

The Commissioners on the Revised Statutes, in their note on *c.* 120, § 11, say: "In many cases of implied assumpsits, and other suits on contracts, the cause of action may remain for a long time unknown to the plaintiff; but unless that knowledge was fraudulently concealed from him, it was never supposed that he could bring his action after the expiration of six years." See also *Adams* v. *Ipswich*, 116 Mass. 570; *Bishop* v. *Little*, 3 Greenl. 405; *Bree* v. *Holbech*, Doug. 630; Banning on Limitations of Actions, 21. Indeed, under the facts in the case at bar, it would seem that, even in a suit in equity, the plaintiff's claim would be barred; *Farnam* v. *Brooks*, 9 Pick. 212, 245; but we have no occasion to decide this point.

The plaintiff further contended that his right of action did not arise until after demand, which was not made until 1880, and that, for this reason, this action is not barred by the statute of limitations.

We are of opinion that the plaintiff's cause of action arose immediately upon the payment of the money, and that no demand was necessary. If the plaintiff should sustain his offer of proof, the defendant held, and claimed as his own, from the moment it was paid to him, money which in equity and good conscience he ought to have immediately repaid to the plaintiff. *Dill* v. *Wareham*, 7 Met. 438. *Earle* v. *Bickford*, 6 Allen, 549. *Utica Bank* v. *Van Gieson*, 18 Johns. 485. *Hawley* v. *Sage*, 15 Conn. 52.

This case differs widely from those in which the defendant is in the rightful possession of money, making no claim to it as his own, but ready to pay it over to the rightful owner; in which it is held that no right of action arises, and that the statute does not begin to run until after a demand upon him by the party entitled to the money, and a refusal to pay it over to the rightful claimant. *French* v. *Merrill*, 132 Mass. 525. *Jones* v. *McDermott*, 114 Mass. 400. *Judgment for the defendant.*

J. P. Treadwell, for the plaintiff.

T. P. Proctor, (*E. Tappan* with him,) for the defendant.

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SIDNEY A. FISHER *vs.* NATHAN CUSHING & another.

Suffolk. Jan. 29. — March 1, 1883. FIELD & W. ALLEN, JJ., absent.

It is no defence to an action against a person, into whose coal-hole in a sidewalk on a street in a city the plaintiff stepped and was injured, that the notice of the time, place and cause of the injury, required by the St. of 1877, *c.* 234, § 8, to be given by a person injured by a defect in a highway to the "persons by law obliged to keep said highway in repair," was not given to the defendant.

HOLMES, J. The plaintiff was hurt by stepping into the defendants' coal-hole, in a sidewalk on Blackstone Street in Boston. At the trial, the defendants asked for a ruling that, having given them no notice in writing of the time, place and cause of his alleged injury within thirty days thereafter, he could not maintain this action. This was refused by the court, and is the only question before us, all other exceptions being expressly waived.

The act on which the defendants rely is the St. of 1877, *c.* 234, §§ 2, 3. The second section gives an action for bodily injuries, &c., suffered through defects in highways, town ways, causeways or bridges, against the "county, town, place or persons by law obliged to repair the same." The third section requires that the person injured shall "within thirty days thereafter give notice to the county, town, place or persons by law obliged to keep said highway, town way, causeway or bridge in repair, of the time, place and cause of the said injury." The third section is new, but the second goes back, through the Gen. Sts. *c.* 44, § 22, and the Rev. Sts. *c.* 25, § 22, to the St. of 1786, *c.* 81, § 7; and the defendants' argument is, that in 1786 there were no "persons by law obliged" to keep highways in repair, unless the words be taken to refer to the common law obligation upon which they are now sued; that the same words in the second section of the St. of 1877 must have the same meaning that they had in the original act, and therefore also in the third section entitling such persons to notice.

But we do not so interpret either the original or the following acts. The sections imposing liability to an action, from the St. of 1786 down, have been part of a statutory scheme creating or

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regulating a public duty to keep the highways in repair. The whole scope of that scheme shows that it is directed to the general public duty, and that it has no reference to the common law liability for a nuisance. The acts first create the obligation to repair, and then give an action for neglect of it. The obligation of the "persons" is the same obligation as that of the counties or towns mentioned alternatively with them. But the obligation of the defendants cannot properly be called an obligation to repair the highway. At most, it only presents itself proximately in that form, but really it lies farther back. It is a duty not to dig or maintain pits in the highway. Such pits can be prevented from being a nuisance by what may be called, by a stretch of language, repairing the highway. But the defendants' duty is confined to the specific spot where the pit is, — exists only by reason of the pit, and not as part of a general duty to repair, — and in truth their liability is not for failing to repair, but for maintaining the pit. If the words relied on by the defendants had applied to cases like theirs, there was no reason why the double damages given by the earlier acts, when recovered from a town, should not have been recovered over from the actual wrongdoer who created the nuisance; whereas in the very cases cited for the defendants the towns or cities that had paid double damages were only allowed to recover single damages, on the ground that that was the extent of the defendant's liability to the party injured. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, 35. *Lowell* v. *Short*, 4 Cush. 275.

The mention of "persons" in the statute, alongside of counties and towns obliged to repair, is easily explained. The outline of our scheme was of ancient date and English origin. In England, while parishes were generally bound to repair highways and bridges, a person might be, *ratione tenuræ*, or otherwise. The language of our act was probably suggested by that of earlier legislation in England. But we cannot say, and probably the Legislature of 1786 could not have said, that there were no cases in the Commonwealth where persons other than counties or towns were bound to keep highways in repair. The words "where other sufficient provision is not made therefor," in the first section of the St. of 1786, imposing the duty on

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the inhabitants of towns, suggests that there were such cases. Even if there were not, it was a natural precaution to use the words. *Exceptions overruled.*

A. A. Ranney & W. B. French, for the defendants.

B. Wadleigh & F. L Wellman, for the plaintiff.

JOSEPH FELS *vs.* C. M. RAYMOND & another.

Suffolk. Jan. 29. — March 1, 1883. FIELD & W. ALLEN, JJ., absent.

If the defendant in an action brought in a municipal court answers with a general denial, is defaulted, and appeals to the Superior Court, he may, under the 43d rule of that court, requiring that "a written answer shall be filed in this court, in all appeal cases, within thirty days after the entry of the appeal, unless the court shall otherwise order," file an answer in that court, setting up, in addition to a general denial, that the action was prematurely brought; and evidence that the action was prematurely brought is properly admitted.

CONTRACT, on an account annexed, for the price of goods sold on May 20, 1881, brought in the Municipal Court of Boston. Writ dated June 11, 1881. The only answer filed in that court was a general denial. The defendants were defaulted and appealed. In the Superior Court, and without other leave than the rule of that court, that written answers in all appealed cases shall be filed within thirty days after entry of the appeal, an answer was filed in that court, which, in addition to a general denial, further averred that the goods were sold on a credit of sixty or thirty days, and that therefore the action was prematurely brought. The plaintiff filed a motion in writing to have this additional averment stricken out; but the motion was disallowed, and no exceptions alleged.

At the trial, before *Pitman*, J., without a jury, the plaintiff proved the sale, delivery and value of the goods, and objected to the admission of any evidence in proof of the averment that the action was prematurely brought; and contended that no evidence was admissible in proof of any issue but that made in the court below. But the judge ruled that the defendants had a right to file a different answer in the Superior Court, without leave, and

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admitted evidence in proof of the new averments; and found for the defendants, on the ground that a credit was given of sixty or thirty days. The plaintiff alleged exceptions.

J. D. Thomson, for the plaintiff.

O. T. Gray, for the defendant.

MORTON, C. J. In a civil suit, an appeal vacates the judgment of the court appealed from, and the case is to be tried in the appellate court upon the pleadings there ordered and the issue there joined, and is open to any defence upon the merits. Pub. Sts. *c.* 155, § 35. The 43d rule of the Superior Court, requiring that "a written answer shall be filed in this court, in all appeal cases, within thirty days after the entry of the appeal, unless the court shall otherwise order," authorized the defendant to file an answer setting up that the action was prematurely brought, this being a defence which may be pleaded in bar, and not mere matter of abatement. *Franklin Savings Institution* v. *Reed*, 125 Mass. 365. The court rightly tried the case upon the issue thus joined in the Superior Court, and evidence that the suit was prematurely brought was properly admitted.

Exceptions overruled.

CHARLES W. WILDER, JR. *vs.* F. A. COLBY.

Suffolk. Jan. 29. — March 1, 1883. FIELD & W. ALLEN, JJ., absent.

If, in an action for goods sold and delivered, the declaration alleges that the defendant owes a certain sum, and the plaintiff's evidence shows that the goods were sold on credit, which had not expired at the date of the writ, the defendant may rightly ask the judge to rule that the action cannot be maintained, on the ground of a variance between the declaration and the proof, although the answer contains a general denial only.

In an action for goods sold and delivered, it appeared that the plaintiff consigned goods to the defendant for sale on the plaintiff's account; that, subsequently, the plaintiff wrote requesting the money for the goods sold, and a return of all the goods unsold which the defendant did not wish to buy; that the defendant returned the money for the goods sold, a portion of those unsold, stated that for the rest a certain sum was due, and offered to pay it by his promissory note on four months, or to return the goods. The plaintiff wrote requesting him to send the note, but received no reply. *Held*, that, in the most favorable view for the plaintiff, the sale was on a credit of four months, and not for cash.

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CONTRACT. Writ dated June 3, 1881. The declaration was as follows: The plaintiff says the defendant owes him $57.10, with interest thereon from the 8th day of February, 1881, for 1400 cigars sold and delivered to him. Answer, a general denial. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, which, after stating that the pleadings might be referred to, was, in substance, as follows:

The plaintiff offered evidence tending to show that on June 7, 1880, he consigned to the defendant $294 worth of cigars, at prices named in the bill of consignment, to be sold by the defendant on his account, and the proceeds remitted; that on October 5, 1880, the defendant sent him $45 as the proceeds of cigars sold; that, some time before the middle of January 1881, he wrote to the defendant, asking him to send the money for what cigars he had sold and to return all the cigars that he did not desire to purchase; that, in answer to this, on January 31, 1881, the defendant returned to the plaintiff cigars worth, at the consignment price, $141.90, and that, on February 8, he sent him a check for $50, making $236.90 in cash and in cigars returned, and a statement, headed "Charles W. Wilder, Jr. to F. A. Colby, Dr.," which contained items on the debtor side, of cash and cigars returned, to the amount of $236.90, and on the credit side were the words, "By goods June 7, 1880, $294. Due $57.10."

Upon this statement were written the following words: "Chas. W. Wilder, Jr.: Dear Sir: The above is statement as I have it on my books. I have kept about $57 worth of the cigars to sell. I will keep them and pay you in four months, as I have always done, or I will return them to you. F. A. Colby."

The plaintiff also testified that he wrote the defendant to send him a note for the amount due, as per this account, but received no reply; and on February 21, 1881, he wrote him, "I am anxious to close books on last year's business and accept your proposition to do so. Please send me your note at 4 mos. from this date, $57.50;" that he received no reply to this, but, on March 7, he received from the defendant a postal card stating that the defendant's shop was burned on February 15.

The defendant introduced evidence tending to show that on February 15, 1881, the cigars, the price of which, at $57.10,

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was referred to in his statement of February 8 as due, were burned with his store.

The defendant contended that the evidence of the plaintiff, if it tended to prove any contract of sale, proved one upon a credit of four months from February 8, 1881, and that there was, therefore, a variance between the evidence and the declaration, and that the plaintiff could not recover, as the suit was brought before the expiration of the said four months, and asked the judge to rule, upon the evidence, that there was a variance between the evidence of the plaintiff relating to any sale and the declaration; also, that, under the evidence of the plaintiff, the action could not be maintained, because it appeared that it was begun before the time of the credit set forth in the contract proved by the plaintiff had expired.

The judge declined so to rule, and submitted the case to the jury, with instructions, which were not excepted to by the defendant. The jury returned a verdict for the plaintiff for $59.72; and the defendant alleged exceptions.

J. H. Hardy, for the defendant.

J. H. Benton, Jr. & W. I. Monroe, for the plaintiff. 1. The only material allegation of the declaration is that the plaintiff sold and delivered fifty-seven dollars and ten cents' worth of cigars to the defendant before the date of the writ. Proof that he did so would sustain the count. *Dorr* v. *Fisher*, 1 Cush. 271. *Morrison* v. *Clark*, 7 Cush. 213.

2. The general denial of the defendant only put in issue the fact of such a sale and delivery. It did not raise the question whether the sale was on time, and the plaintiff was entitled to go to the jury if he offered evidence tending to show that he sold and delivered cigars of the value alleged at any time before the date of his writ. Pub. Sts. *c.* 167, § 20. *Reed* v. *Scituate*, 7 Allen, 141. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541.

3. On the evidence, the jury might and ought to have found that the defendant purchased the cigars on January 31, when, being called on to return all that he did not wish to purchase, he sent back all but the fifty-seven dollars and ten cents' worth, which sum he marked as "due" on his statement sent to the plaintiff eight days after, with his proposal to pay in four months

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(i. e. pay what was then due), which proposition the plaintiff accepted only on condition that he should receive a note for the amount, which the defendant never sent. The only time when the minds of the parties met was when the defendant, holding the letter of the plaintiff requesting him to purchase what he did not return, returned all but fifty-seven dollars and ten cents' worth.

MORTON, C. J. A count in indebitatus assumpsit for goods sold upon a credit will not lie until the credit has expired. Such a count imports an allegation either that there was no credit or that it has expired. *Hunneman* v. *Grafton*, 10 Met. 454. *Morrison* v. *Clark*, 7 Cush. 213.

In this case, the plaintiff's evidence showed that he consigned the goods to the defendant in June 1880; that in February 1881, negotiations were had between the parties as to a sale of the balance remaining in the hands of the defendant. Regarding the plaintiff's evidence in the light most favorable to him, the utmost that it proves is a sale to the defendant upon a credit which had not expired at the time of the commencement of his suit. This was a fatal variance. To maintain his action, he is required to allege and prove that the debt was due and payable at the time of its commencement; his proof shows that the debt was not due and payable, and that he cannot maintain his action.

It is not a question of pleading by the defendant, but of proof by the plaintiff. *Morrison* v. *Clark*, *ubi supra*. In *Reed* v. *Scituate*, 7 Allen, 141, upon which the plaintiff relies, the question decided was a question of pleading, and the court carefully guards its opinion so as to exclude this case from its effect, by saying that, if the plaintiff himself, in making out his case, proved a credit which had not expired when the suit was commenced, "perhaps the defendant might have taken advantage of the evidence."

We are of opinion that the Superior Court should have ruled, as requested, that there was a variance between the plaintiff's allegations and proofs; and that, upon the evidence, he could not maintain his action. *Exceptions sustained.*

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CAROLINE S. SWETT *vs.* CADIS B. BOYCE & others.

Suffolk. Nov. 15, 1882. — March 2, 1883. W. ALLEN & HOLMES, JJ., absent.

A. bought goods under a contract in writing by which the title to the goods was to remain in the seller until paid for by instalments. Subsequently, A. bought other goods from time to time, and at each time a schedule of the goods was entered upon the original contract, and A. signed an agreement upon the same instrument, stating that he authorized the additions to the within "upon the same terms, conditions and agreements" as therein contained. A. made payments from time to time, for which receipts were given "as per lease." The entire amount due not having been paid, the seller took possession of the goods under the contract, and A. replevied the goods. At the trial of the action, there was no evidence as to the appropriation of any of the payments, by either party, to any particular portion of the goods. *Held*, that these facts would warrant a finding that the successive purchases were intended to be separate contracts; and that a ruling was right, that the payments should be applied to the earliest items of the account; and that when they amounted to the price of the goods bought at any one time, there was a payment for that lot.

A., who had possession of chattels under a contract of sale by which they were to become his property on payment for them, assigned his interest in the contract to B., and took a writing from B., which stated that A. was to have the chattels on payment of an amount advanced. A. retained possession of the chattels, and paid B. the amount advanced, but no reassignment of the contract was made. Subsequently the seller of the chattels took possession of them for an alleged breach of the contract of sale. *Held*, that the transactions between A. and B. did not prevent A. from maintaining an action of replevin.

A. was in possession of chattels bought under different contracts from B., by the terms of which the chattels were to become A.'s property when paid for. Being notified by B. that he would take possession of the chattels for breach of the contract, A. applied to C. for assistance, representing that a certain sum was due on account of the chattels, but saying nothing as to that sum being due upon any particular part of them. C. declined to assist A., and subsequently bought B.'s interest in the contracts for the sum which A. had represented was due, and took possession of all the chattels. *Held*, in an action of replevin by A. against C., that A. was not estopped to deny that the amount he represented as due did not apply to any particular chattels.

If goods are sold to A., under an agreement that they shall be paid for by instalments and shall become the property of the purchaser when paid for, a payment made by a third person who has bought the interest of the seller in the contract does not enure to the benefit of A.

If B. sells goods to A. by a conditional sale, and afterwards takes possession of them for an alleged breach of condition, and sells them to C., in whose possession they are when taken by A., by a writ of replevin, the joinder of B. as a party defendant is wrongful.

REPLEVIN of a lot of household furniture, against Cadis B. Boyce and William Boyce, copartners doing business under the name of Boyce Brothers, and John A. Clark. Writ dated

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December 22, 1879. Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff obtained a lot of goods to the amount of $745.79, on March 8, 1875, under an agreement signed by her, which, after setting forth a schedule of the goods, the price of each article and the aggregate price, proceeded as follows:

"I have this day received of Boyce Bros. the merchandise named in the foregoing schedule, upon a conditional contract of sale, the condition being, that if I pay said Boyce Bros. nothing dollars on the day of the date hereof, and fifty dollars on or before the eighth day of April, and the same sum on or before the same day in each and every of the following months, from the date hereof, until the whole amount shall have been paid, then said merchandise is to become my property. I am to retain said merchandise for my own use, in the premises now occupied by me, at No. 10 Davis Street, Boston, Massachusetts, and it is not to be removed therefrom without the written consent of said Boyce Bros. In case said merchandise is attached, seized on execution, or liable to be disturbed from any other cause, I agree to give said Boyce Bros. immediate notice. If default is made in the payment of any of the sums above specified, or in the performance of any agreement herein contained, said Boyce Bros., or their agents, may without notice, immediately or at any time thereafter, enter upon my premises, and take possession of said merchandise, and thereupon all claim or right on my part under this contract shall cease and determine; and I agree to deliver said merchandise to said Boyce Bros. in as good order and condition as the same now is, reasonable use and wear thereof excepted."

On March 23, the plaintiff obtained of the Boyces goods to the amount of $140; on April 9, goods to the amount of $400.78; on August 6, goods to the amount of $48; and on January 1, 1876, goods to the amount of $250.99. At each of these times a schedule of the goods was made on the original instrument, and the plaintiff at each time signed an indorsement upon said instrument as follows: "I hereby authorize the additions to the within, of this date, upon the same terms, conditions and agreements as within contained."

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Payments were made by the plaintiff to Boyce Brothers from time to time. The first payment was on April 8, 1875, of $50; the second payment was on May 10, of $52; and prior to August 6, the plaintiff had made various payments, amounting in all to $610. The payments during the year 1875 amounted to $711, and those during the year 1876 to $531.50. Receipts were given for the sums of money paid "as per lease." There was no evidence as to the appropriation of any of the payments, by either party, to any particular portion of said articles.

On April 29, 1878, the plaintiff executed the following assignment on the back of the contract of sale: "For value received, I hereby assign to Mrs. Julia A. Gould all my interest in the within contract." At the same time she received from Gould a written agreement, signed by Gould, as follows: "This is to certify that Miss C. S. Swett has this day made an assignment to me of a certain lease held by Boyce Brothers, on household furniture now in house No. 10 Davis Street, Boston, with the understanding that the said C. S. Swett is to have said goods after she shall have paid me the amount I have advanced her." There was no evidence of any formal reassignment to the plaintiff by Gould; but it appeared that the plaintiff had repaid Gould all the money which said assignment was made to secure, prior to September 1, 1878.

In April 1879, Boyce Brothers contended that the plaintiff was in arrears over $600 in her payments, and notified her that they would take possession of said furniture, unless some satisfactory arrangement was made at once, whereby prompt payment of the balance due them should be secured; and at the same time offered to accept $400 in settlement of said balance if paid immediately. The plaintiff appealed to the defendant Clark, then her landlord, to assume her indebtedness to Boyce Brothers for the furniture, which she represented to be $400, and to allow her to repay him by increased payments of house rent and otherwise, as they might arrange. Nothing was said as to the $400 being due upon any particular part of the furniture. After some negotiations, the defendant Clark refused to accede to the plaintiff's proposal, and told the defendants Boyce Brothers that he would have nothing to do with her in the premises; but, early in May following, he entered into a verbal agreement with

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Boyce Brothers, upon his own account and for his own benefit, and not in behalf of the plaintiff, whereby he undertook to pay to Boyce Brothers $400 in equal monthly instalments of $50 each, in consideration that they should assign all their interest in the premises to him. It appeared that the plaintiff knew that some arrangement had been made between Clark and Boyce Brothers, but not that she knew what it was. No demand was thereafter made upon her by Boyce Brothers for payments on account of the furniture, and no further payments were made by her. Clark continued to make said monthly payments of $50 regularly to said Boyce Brothers, and the plaintiff remained in the possession and use of the house and furniture.

On or about September 15, 1879, William Boyce, one of the defendants, in behalf of Boyce Brothers, entered the plaintiff's house with the defendant Clark, and Clark asked him to take possession of the furniture in question; and Boyce thereupon took possession of all the furniture scheduled on the conditional bill of sale and the several additions thereto, claiming the right so to do on account of the failure of the plaintiff to make payment, and thereupon put the same into the possession and custody of the defendant Clark. The plaintiff was at the same time ejected from the house, as a tenant, by legal process, and deprived of all further use of the furniture. No demand had been made by her before the service of this writ for said furniture, or for any portion thereof.

The defendant Clark continued to make said monthly payments to Boyce Brothers, until the whole sum of $400 had been paid by him, the last of these payments being made on December 18, 1879, on which day Boyce Brothers made a written assignment of all their right, title and interest in the furniture to Clark; and thereafter Boyce Brothers neither had, nor claimed to have, any right, interest or title in, or custody or control of, said furniture, or any portion thereof.

The plaintiff's counsel requested the judge to rule as follows: "1. Boyce Brothers having agreed, in May 1879, to accept from Clark $400, in equal monthly instalments of $50, for the balance that they claimed to be due them on the bill of sale, and thereafter receiving such instalments without having repossessed themselves of the furniture, thereby waived and became devested of

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their right to take possession on account of any prior breach of condition; and, there being no evidence of any subsequent breach, the taking possession by Boyce was wholly tortious. 2. The Boyces, having taken possession of the furniture with the knowledge and complicity of Clark, if such taking was tortious, could not avoid a joint liability with Clark to the action, by a subsequent assignment to him of all their right, title and interest in the furniture."

The judge declined so to rule, holding that the first request was based upon an erroneous view of the evidence; that the second request was based upon an erroneous assumption of the tortious character of the taking, and, even upon that assumption, was not correct law as applied to the action of replevin.

The defendant Clark requested the judge to rule as follows: "1. If the defendant Clark paid Boyce Brothers $400, upon or by reason of representations made by the plaintiff to him that that amount was due Boyce Brothers, she is estopped to deny it now, and is estopped, as to him, to deny that that amount did not apply to any particular goods. The additions to the lease subsequent to March 8, 1875, under the agreements and payments in respect to the same, were not independent and distinct purchases, but the goods so added became a part of and subject to the original contract, and to the conditions expressed in that contract so far as applicable, and did not become the property of the plaintiff unless the total amount of said lease agreement was fully paid by her. 2. The goods obtained on March 8 and March 23, 1875, did not become the absolute property of the plaintiff on the payments by her, made generally on the contract or lease, of a sum equal to the price named for said goods. 3. Even if the plaintiff could or might have maintained an action for a part or some of the articles, yet if they were all mingled together, and she, before service of the action, made no demand for any particular goods, and did not point out or designate or specify the goods which she then might have replevied, this action will not lie even as to such goods. 4. If the defendant Clark acquired or had a lien on the goods, and possession of them, by or in consequence of his payment of $400, on the plaintiff's statements or representations that that sum was due on them, he (Clark) could hold all the goods until all that sum

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was repaid him. 5. If, upon the facts, the plaintiff cannot maintain the action as to all articles, she cannot as to any part of them. If there was not a reassignment of the lease agreement to the plaintiff by Julia A. Gould, the plaintiff cannot maintain this action."

The judge refused so to rule, and ruled and held, in relation to the points covered by the above requests, that, upon the facts found, no estoppel arose between the plaintiff and Clark; that the successive purchases were upon separate contracts, though identical in nature, and that, as matter of law, the payments of cash made by the plaintiff should be applied to the earliest indebtedness, and when they equalled the aggregate price of any such separate lot, it operated as a payment for such lot, and vested the property in the plaintiff; that the defendant Clark had no lien upon the goods so paid for, to secure his payments to Boyce Brothers; and that, under the facts proved, no formal reassignment was necessary from Mrs. Gould, nor any demand prior to suit. And upon the whole case, the judge, having found, upon this view of the law, that the goods purchased on March 8 and 23 had been fully paid for by the plaintiff, ordered a judgment for the plaintiff as to those, and a judgment for the defendant Clark as to the residue of the replevied property.

A general judgment for the other defendants was ordered, upon the ground that no action would lie against them, because at the date of the writ and at the time of its service they neither had nor claimed to have any possession of any of the property.

The plaintiff and the defendant Clark duly excepted to the refusal to rule as they requested, and to the adverse rulings.

G. H. Kingsbury, for the plaintiff.

C. F. Loring, for Clark.

J. B. Richardson, for the other defendants.

FIELD, J. It is perhaps not a pure question of law, whether, on the facts found, the successive purchases of goods are to be regarded as made under one entire contract or under separate contracts. The parties may have intended that the goods purchased after the first agreement should be held under the original agreement, in the same manner and with the same rights in each party as if they had been a part of the original purchase, or that each successive lot of goods purchased should be held as

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a separate purchase upon the same terms and conditions as are contained in the original agreement. The precise question is, whether it was the intention of the parties, as expressed in the written agreements, construed in reference to the circumstances under which they were made, and the conduct of the parties, that the title to the goods first purchased should pass to the plaintiff, if and when she paid for them according to the terms of the agreement under which she first purchased them, or should not pass to her unless and until she also performed the agreements subsequently made, when from time to time other goods were delivered to her. A similar question arises in regard to the goods delivered on March 23. The plaintiff once had the right to obtain the title to the goods first purchased by paying for them according to her agreement of March 8. Whether she had waived or lost this right by her subsequent purchases and agreements was the question in dispute.

We are of opinion that it was competent for the justice before whom this case was tried to find, on the evidence reported and the facts found, that the successive purchases were in this respect intended to be and were upon separate contracts; that it does not appear that in so finding he violated any principle of law; and that, although it appears by the report that he so "ruled and held," this is not to be considered as a ruling that this conclusion necessarily follows, as matter of law, from the facts found, but as a ruling that such a conclusion is warranted in law by the facts found, and is the actual conclusion drawn by him.

The ruling "that, as matter of law, the payments of cash made by the plaintiff should be applied to the earliest indebtedness" was justified by the facts found, including the fact that "there was no evidence as to the appropriation of any of the payments, by either party, to any particular portion of said articles." *Crompton* v. *Pratt*, 105 Mass. 255. *Worthley* v. *Emerson*, 116 Mass. 374. It follows necessarily from the preceding findings and rulings, that, when these payments "equalled the aggregate price of any such separate lot, it operated as a payment for such lot, and vested the property in the plaintiff."

The assignment to Julia A. Gould by the plaintiff, if it be considered as an assignment of property in personal chattels,

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and not an assignment of a chose in action, taken in connection with the paper given by Gould to the plaintiff, would constitute, as between the parties, either a mortgage or a pledge, and would be discharged by a payment of the money which the assignment was given to secure; and no formal reassignment was necessary to vest the property in the plaintiff. It does not appear that Gould ever had possession of the property, and it does appear that at the time the property was taken by the defendants it was in the possession and use of the plaintiff.

It is difficult to understand what the contention of the defendant Clark is, in regard to estoppel. His first request for instruction is, that, "If the defendant Clark paid Boyce Brothers $400, upon or by reason of representations made by the plaintiff to him that that amount was due Boyce Brothers, she is estopped to deny it now, and is estopped, as to him, to deny that that amount did not apply to any particular goods." The evidence was that the plaintiff asked Clark to assume her indebtedness to Boyce Brothers, which she represented to be $400, and to allow her to pay him as they might arrange, and that "nothing was said as to the $400 being due upon any particular part of the furniture." Clark declined to do this, and afterward, on his own account and for his own benefit, bought the interest of Boyce Brothers in the goods. It does not appear that the plaintiff made any statement to Clark that the $400 was due on all of the goods, or that she made any statements to Clark with the design that he should purchase the interest of Boyce Brothers in the goods upon his own account and for his own benefit. This was done by him for his own purposes, and not by any inducement of the plaintiff. There is no estoppel.

The plaintiff can maintain this action to recover possession of such of the articles replevied as she owned at the date of the writ; and the exceptions of the defendant Clark must be overruled.

The first request of the plaintiff for instructions was rightly refused. The payments made by Clark were not for her benefit. Her second request for instructions was also rightly refused. The action was brought on December 22, 1879. At that time, the goods were in the possession and custody of Clark, and Boyce Brothers "neither had, nor claimed to have, any right, interest

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or title in, or custody or control of, said furniture, or any portion thereof." This action of replevin cannot therefore be maintained against Boyce Brothers. *Hall* v. *White*, 106 Mass. 599. *Richardson* v. *Reed*, 4 Gray, 441.

The rulings of the presiding justice were correct, and there must be *Judgment on the findings.*

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *vs.* GEORGE ALLEN & another.

Suffolk. Nov. 24, 1882. — March 2, 1883. DEVENS & HOLMES, JJ., absent.

A bill of interpleader, brought by a citizen of another State against two citizens of this State, cannot be removed, on the petition of one of the defendants, to the Circuit Court of the United States, under the U. S. St. of March 3, 1875, § 2.

FIELD, J. This is a bill of interpleader, brought by a corporation organized under the laws of the State of New York, against two citizens of Massachusetts. Catherine Fellows, one of the defendants, petitions this court for a removal of the cause to the Circuit Court of the United States. She contends that she has a controversy with the plaintiff, which is whether the plaintiff can maintain its bill and compel her to interplead with the other defendant. If the defendants are compelled to interplead, the controversy then becomes one wholly between citizens of Massachusetts.

To maintain a petition under the first clause of the U. S. St. of March 3, 1875, § 2, it is necessary that all the persons on the same side of the dispute should join in the petition for the removal, and that there should not be any person on one side of the dispute who is a citizen of the same State as any person on the other side. If the controversy in this cause be regarded as between the two defendants on the one side and the plaintiff on the other, the petition cannot be maintained, because the defendant Allen has not joined in it. If the controversy be regarded as between the two defendants, it is a controversy between two citizens of the same State. If the controversy be

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regarded as between the defendant Fellows on the one side, and the plaintiff and the defendant Allen on the other, Allen is a citizen of the same State as Fellows. Allen cannot be rejected as an unnecessary or nominal party. The petition cannot therefore be maintained under the first clause of this section. *Blake* v. *McKim*, 103 U. S. 336. *Removal cases*, 100 U. S. 457, 469. *Smith* v. *Rines*, 2 Sumner, 338. *Beardsley* v. *Torrey*, 4 Wash. C. C. 286. *Bryant* v. *Rich*, 106 Mass. 180, 191.

To maintain a petition under the second clause of this section by one of two defendants against the plaintiff, it is necessary that the petitioner and the plaintiff should be citizens of different States, and that there should be a controversy between them which is so far distinct from the controversy between the plaintiff and the other defendant that it can be separately determined. *Corbin* v. *Van Brunt*, 105 U. S. 576. *Danvers Savings Bank* v. *Thompson*, 130 Mass. 490, and 133 Mass. 182. That clause contemplates that the suit is of such a nature that it can be divided into two parts, and that one part may be removed to the Circuit Court of the United States and be fully determined in that court, and that the other part may remain in the State court and be fully determined there. This suit is of such a nature that a separation of it into two parts necessarily destroys it. The plaintiff cannot maintain a bill of interpleader against one defendant in either court. Whether one citizen of Massachusetts shall be compelled to interplead with another citizen of that State, is a controversy which cannot be maintained as to one of the defendants without determining it as to the other. The petition to remove the cause is *Denied.*

W. F. Slocum & W. S. Slocum, for the petitioner.

J. F. Colby & J. Wales, contra.

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J. W. STEWART *vs.* GEORGE GRISWOLD & another.

Suffolk. Jan. 15. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

Under the St. of 1877, *c.* 250, § 1, providing that the notice to be issued by a magistrate, to whom application has been made for a certificate authorizing the arrest of a debtor upon the first charge specified in the Gen. Sts. *c.* 124, § 5, to the debtor to appear and submit himself to an examination touching his estate, may be served on the debtor by "leaving the same at his last and usual place of abode not less than three days before the time fixed for the examination, and one day additional for every twenty-four miles travel," a notice to a debtor to appear on the eighth day of a month at nine o'clock in the morning, left at his abode, a little over a mile from the place of examination, on the fourth day of the month at seven o'clock in the evening, is sufficient.

In an action upon a poor debtor's recognizance, entered into under the Gen. Sts. *c.* 124, § 10, oral evidence is inadmissible to show that the debtor's last and usual place of abode is different from that recited in the return of the officer who served the notice upon the debtor to appear for examination, issued by a magistrate under the St. of 1877, *c.* 250, § 1.

A certificate of a magistrate, under the St. of 1877, *c.* 250, § 1, reciting that "I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset," is sufficient.

HOLMES, J. This is an action on a recognizance given under the Gen. Sts. *c.* 124, § 10. The defendants allege that the arrest on which the principal defendant was brought before the magistrate who took the recognizance was unlawful, and that therefore the recognizance is void. The main point relied on in support of this contention is that no sufficient notice to appear for examination was given to the principal defendant under the St. of 1877, *c.* 250, § 1. By that statute, "Such notice may be served by . . . . leaving the same at his last and usual place of abode not less than three days before the time fixed for the examination, and one day additional for every twenty-four miles travel." The notice in question notified the defendant to appear on January 8, at nine A. M., and was served on January 4, at five minutes before seven P. M. In our opinion, this satisfied the statute.

When an act is to be done a certain number of days before an event, the arbitrary rule of law which excludes the whole day of the event and refuses to recognize fractions of a day, works out a rough equality and substantial justice by giving the actor the benefit of the whole day on which the act is

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done. *Butler* v. *Fessenden*, 12 Cush. 78. *Bemis* v. *Leonard*, 118 Mass. 502, 507. It is true that in England a distinction has been established when the law requires "not less than" a certain number of days. But it is obvious that the true meaning of those words in this statute is only that the shortest notice must be three days, and the English cases adopted the opposite rule with expressions of regret, on the ground that, it having been once laid down, although seemingly without consideration, in *Zouch* v. *Empsey*, 4 B. & Ald. 522, and the matter being wholly indifferent, it was better to adhere to the decision. *Regina* v. *Justices of Shropshire*, 8 A. & E. 173, 175, 176; *S. C.* 3 Nev. & P. 286. *Regina* v. *Justices of Middlesex*, 3 Dowl. & L. 109; *S. C.* 2 New Sess. Cas. 73; 14 L. J. (N. S.) M. C. 139. Cf. *Robinson* v. *Waddington*, 13 Q. B. 753, 756. The same reasons exist for adhering to the decision of our own court in *Butler* v. *Fessenden*, *ubi supra*, and for rejecting an artificial distinction which does not commend itself to us.

If it were necessary, we should be inclined to go one step further and to read the words "one day additional for every twenty-four miles travel" as meaning "at the rate of one day additional," which is the phrase adopted in the Pub. Sts. *c.* 162, § 18. The provision is evidently modelled on the earlier ones concerning notice to plaintiffs by defendants wishing to take the poor debtor's oath. Gen. Sts. *c.* 124, § 13. Sts. 1857, *c.* 141, § 4; 1855, *c.* 444, § 4; 1844, *c.* 154, § 3. These all require notice "at the rate of one day additional for every twenty-four miles travel." And it has been held under one of them that, when the travel was only a fraction of a mile, the time allowed for it need not be more than the corresponding fraction of an hour. *Jacot* v. *Wyatt*, 10 Gray, 236. There seems to be no reason why the same principle should not be applied to the present case. The letter of the statute does not deal with fractions of twenty-four miles travel, and it seems to be almost as unreasonable to shut our eyes to the obviously intended proportion between time and travel on the side of the defendants, who demand twenty-four hours for a little over a mile, as it would be to do so in accordance with the plaintiff's, that there is no allowance when the travel is less than twenty-four miles.

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The defendants sought to invalidate the arrest on the further ground that the notice was not left at the debtor's last and usual place of abode; and that, as the officer's return that it was so left set forth the number and street of the house at which service was made, parol evidence was admissible that the debtor's last and usual place of abode was not at that house. But we perceive no reason for admitting the evidence in this case, which would not equally apply when the place of service was not mentioned in the return. The return in the latter case would convey two propositions, (I served at a certain place, and that place was the debtor's last and usual place of abode,) neither of which could be controverted. *Smith* v. *Randall*, 1 Allen, 456, 458. *Lang* v. *Bunker*, 1 Allen, 256. The fact that the former of these is set forth more specifically does not warrant a denial of the other.

The magistrate's certificate read, "I hereby authorize the arrest of the said debtor Griswold, if his arrest is authorized by law, to be made after sunset." The further objection is urged, that the only authority for an arrest is the magistrate's order; and that therefore these words were equivalent to saying, I authorize the arrest if I authorize it, and were insufficient. But this objection also must fall. The order only purported to authorize an arrest after sunset, which was the only case for which the magistrate's order was necessary, or to which his power extended. Gen. Sts. *c.* 124, § 8. Pub. Sts. *c.* 162, § 26. An arrest by day was authorized by law without any order from him, upon his making a certificate of the necessary facts. *Manuel* v. *Bates*, 104 Mass. 354. In this case, he set forth facts upon which an arrest would be authorized by law; and adds that, if an arrest would be so authorized, he authorizes it to be made after sunset. There is nothing in the proviso to invalidate the authority given.

As the defendants' objections to the validity of the arrest are not sustained, we have not found it necessary to consider whether its illegality would have made the recognizance invalid.

Judgment for the plaintiff.

J. B. Richardson, for the defendants.

F. Hutchinson, (*W. H. Preble* with him,) for the plaintiff.

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FRANKLIN G. DEXTER & others *vs.* EPISCOPAL CITY MISSION & others.

Suffolk. Jan. 23. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

Personal property was conveyed by an indenture, in trust to pay from the "net income" an annuity to the sister of the grantor "during her life;" to pay from the "net income" an annuity to a charitable corporation "during the continuance of this trust;" "after the payment of said sums," to invest the remainder of the income, "to be accounted for as an accumulation of the capital fund," until certain grandchildren of the grantor became of age, and then to pay them certain specified sums; after payment of these sums, then "after paying out of the income the said annuities," to divide the remaining income among the four children of the grantor, until a certain grandchild should arrive at the age of twenty-five years, and one or more of the grantor's children should die; on said grandson arriving at the age of twenty-five years, "and after payment of all the said sums specifically directed to be paid," to pay "one fourth part of the remaining accumulated principal and income" on the death of any child to such person as he should by will appoint, or, in default of appointment, to his issue, "it being the intention of the grantor that each child shall have and receive its equal share of the income of the whole fund after the period" when the said grandchild should have attained to the age of twenty-five years, and that, after his death, "his equal portion of the principal and any accumulated income" should be subject to his disposal by will, or should go to his issue. *Held*, that the trust in favor of the charitable corporation continued after the arrival of the grandchild at the age of twenty-five years, and until the death of the sister of the grantor and the decease of all of the grantor's children.

BILL IN EQUITY, filed February 27, 1882, by the surviving trustees under an indenture executed by William Appleton on January 25, 1862, to determine whether a provision made, in the third article of the indenture, for the benefit of the first-named defendant, was still in force.

The indenture, a copy of which was annexed to the bill, conveyed to trustees named certain shares of corporate stock, upon certain trusts, as therein set forth. The provisions which need now be stated were as follows:

Article 1 provides for keeping the trust fund invested in certain securities named.

Article 2. "To collect and receive the income to accrue therefrom, and, after deducting all reasonable and necessary costs and charges, in trust to pay from such net income the sum of one thousand dollars annually to Mrs. S. H. A. Burnham, sister of the grantor, to her sole use during her life."

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Article 3. "To pay from said net income to the trustees of the Boston City Missionary Society, located in Purchase Street, Boston, the sum of six hundred dollars annually during the continuance of this trust."

Article 4. "After the payment of said sums, to invest the remainder of such income as soon as reasonably may be, in like good and safe securities, to be accounted as an accumulation of the capital fund," until a certain grandson of the grantor should arrive at the age of twenty-one years, and then to pay him a certain sum, with provisions in case of his death with or without issue living.

Articles 5 and 6 contained similar provisions for other grandchildren of the grantor.

Article 7. "In like manner to collect and invest the income of the residue, until Franklin Dexter, grandson of the grantor, shall arrive at the age of twenty-one years," and then, if living, to place a certain sum in trust for him, with a provision in case of his death before attaining that age. "And then to collect and invest the income of the residue, until he shall arrive at the age of twenty-five years, if he shall so long live," and then to place an additional sum in trust for him, with provisions in case of his death before attaining that age.

Article 8 contains provisions for the payment to persons named of certain sums "from out of the principal fund and accumulated income," when Franklin Dexter shall have attained the age of twenty-five years.

Article 9 provides that after the payment of the sums directed to be paid to, or deposited in trust for, the persons named in the 4th, 5th, and 6th articles, if the amounts remaining should be in the opinion of the trustees at least one million of dollars, then, "after paying out of the income the said annuities, to divide the remaining income thereafter accruing to and among the four children of the grantor, William Appleton, Jr., Charles H. Appleton, Sarah E., wife of said Amos A. Lawrence, and Hetty, wife of said Thomas Jefferson Coolidge, equally, or the issue of either or any of them, who shall have deceased, taking by representation the share the parent would have taken if living, or if either shall have deceased without issue, then to pay over his or her share to such person or persons as he or she

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shall have appointed and directed by his or her last will, and for want of any such issue or will, to pay over the same to his or her heirs at law until the said Franklin Dexter shall have arrived at the age of twenty-five years, or the period shall have arrived at which he would have attained to that age, and the death of one or more of the said children of the grantor; upon the happening of both which events, a partition of the capital fund shall be instituted as hereinafter provided."

Article 10. "After the period when the said Franklin Dexter shall have attained to the age of twenty-five years, or would so have attained, if living, and after payment of all the said sums above specifically directed to be paid or deposited, then, upon the subsequent decease of either of the said children of the grantor, William, Charles H., Sarah E., or Hetty, or if either of them shall then have deceased before that period, to pay over one fourth part of the remaining accumulated principal and income, in whole or in parts, to such person or persons, and upon such terms and conditions, as such deceased child shall, by his or her last will and testament, have directed and appointed, and which will or appointment the said daughters are hereby empowered to make, any their coverture notwithstanding, and upon failure of any such will or appointment, then in trust to pay said fourth part to the issue of such deceased child, and upon failure of such will or appointment and issue, then to pay over the same to his or her executors or administrators, for the benefit of his or her heirs at law who would have been entitled to receive the same under the statutes of distribution, if he or she had died in possession thereof. And, upon the subsequent death of any other child, in trust to pay over its share of the residue of the remaining fund and accumulated income in like manner; it being the intention of the grantor that each child shall have and receive its equal share of the income of the whole fund after the period when the said Franklin should have attained to the age of twenty-five years, if living; and that upon the decease of either, before or after that time, his or her equal portion of the principal, and any accumulated income existing at the time of his or her decease, shall be subject to his or her disposal by will, and for want thereof descend to his or her

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issue, or heirs at law, as above provided, until the death of the last survivor of them."

The bill alleged, that William Appleton, Jr. died on February 10, 1877; that Charles H. Appleton died on April 3, 1874; that Mrs. Burnham was still living; that the trustees of the Boston Missionary Society had been incorporated at the date of the indenture under the name of the Episcopal City Mission, and was the corporation intended to be the recipient of the annuity mentioned in the third article of the indenture; that the trust fund amounted to more than one million of dollars; and that Franklin Dexter would arrive at the age of twenty-five years on May 10, 1882.

The answer of the Episcopal City Mission admitted the allegations of the bill, and stated its claim to be that the corporation was entitled to $600 annually until the decease of Mrs. Burnham and of the surviving child of the grantor; and that its right did not cease on Franklin Dexter's arriving at the age of twenty-five years.

The answer of the other defendants admitted the allegations of the bill, and stated their claim to be that the trust ended on Franklin Dexter's arriving at the age of twenty-five years.

Hearing, upon the bill and answers, before *Devens*, J., who reserved the case for the consideration of the full court.

J. C. Ropes & E. M. Parker, for the Episcopal City Mission.

S. Bartlett, for the other defendants.

C. ALLEN, J. The considerations in favor of one or the other construction of this indenture are nearly equal; but upon the whole it appears to us more probable that the founder of the trust meant to continue the annuity to the City Missionary Society till all the trusts should be fulfilled. His main purpose will be substantially carried out by making a partition of all the capital fund, except so much thereof as may be sufficient to provide for the payment of this annuity and that to Mrs. Burnham; which portion may be reserved by the trustees till her death and that of the two surviving children of the donor, and be divided afterwards. The trust is to continue till those events happen. The inconveniences of this construction are appreciable, to be sure, and particular expressions in the indenture were

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not framed with apparent recognition of the possible necessity of such a reservation. But this objection is equally applicable to the continuance of the annuity to Mrs. Burnham, for which it is virtually conceded that some provision must be made; and full effect will thus be given to the charitable purposes of the donor. *Decree accordingly.*

MOSES W. PHILBROOK, administrator, *vs.* JOHN EATON.

Suffolk. Jan. 29. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

An administrator, upon proof of the execution of a formal bill of sale of personal property to his intestate, acknowledging receipt of the consideration therein named, and proof of a subsequent sale of the same property by the grantor, is *prima facie* entitled, in an action for conversion against the latter, to recover the value of the property at the time of the subsequent sale.

No delivery of the personal property named in a formal bill of sale is necessary to pass the title, as between the parties.

Oral evidence is inadmissible to show that a formal bill of sale of personal property, acknowledging receipt of the consideration therein named, was given as security for a loan of the amount of the consideration.

A party who has succeeded, against the objection of the adverse party, in introducing incompetent evidence, has no ground of exception because the presiding judge does not give it the weight it would be entitled to if competent.

If the grantor in a bill of sale of personal property, acknowledging receipt of the consideration therein named, retains possession of the property and again sells it, the second sale, and not a refusal to deliver the property to the first purchaser upon a subsequent demand, constitutes a conversion.

The description of personal property in a bill of sale, the consideration therein recited, and the fact that the grantor, who retains possession of the property, has again sold it, are evidence upon the question of value, in an action by the grantee for conversion of the property.

TORT, by the administrator of the estate of John D. Philbrook, for the conversion of certain household furniture. Answer, a general denial. Trial in the Superior Court without a jury, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff, as administrator, made a demand upon the defendant for said furniture before bringing this action, but the defendant did not deliver it, having previously, in July 1879,

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sold it to one Sawyer. The defendant was allowed to put in evidence, subject to the plaintiff's exception, that he borrowed of the plaintiff's intestate $250, and gave as security therefor a mortgage of a parcel of real estate in Beverly, and, as additional security, a bill of sale of said furniture, dated January 17, 1874, in which the consideration was expressed to be $250, the receipt of which was acknowledged; that no money was paid except the sum of $250 so lent; that the intestate never took possession of said furniture, but it had always remained in the possession of the defendant until he sold it to Sawyer, as above stated. The bill of sale was not recorded. There was no evidence of value except the bill of sale, and the fact of the sale of the furniture to Sawyer.

The defendant asked the judge to rule as follows: "1. If the instrument relied on was a bill of sale, it was without consideration, and no title passed to the vendee. 2. The goods named in the bill of sale were pledged, and, the goods never having been in possession of the pledgee, no title passed, and this action cannot be maintained. 3. An administrator is not a party so as to come within the Gen Sts. *c.* 151, § 2. 4. The amount recoverable in an action for conversion is the value of the goods at the time they were converted. No value having been proven, and the existence of the goods not having been proven, nothing can be recovered in this action. 5. This action cannot be maintained against the defendant, as at the time of the alleged conversion he had not possession, nor any control over or interest in the goods."

The judge declined so to rule, but ruled that, as between the original parties, the action could be maintained, whether the goods were mortgaged, pledged or sold, and that, on the evidence of the consideration of the amount named in the bill of sale, and the nature of the goods, he found the damages to be $75. The defendant alleged exceptions.

C. C. Barton & A. D. McClellan, for the defendant.

J. F. Wiggin & B. M. Fernald, for the plaintiff.

COLBURN, J. The written instrument under which the plaintiff claims is a formal bill of sale, not a bill of parcels, and on its face purports to be the evidence of an absolute sale of the property therein described by the defendant to the plaintiff's

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intestate, in consideration of $250, which the defendant acknowledges that he received.

The plaintiff, who by operation of law represents the personal property and rights of his intestate, sustains the same relation to the defendant, and to the property in controversy, that his intestate sustained before his decease. No question as to the right of creditors or purchasers without notice is raised.

As between the plaintiff and defendant, no delivery of the property was necessary to pass the title. *Parsons* v. *Dickinson*, 11 Pick. 352. *Packard* v. *Wood*, 4 Gray, 307.

The plaintiff, upon proof of the execution of the bill of sale, and payment of the consideration, which was sufficiently proved, *prima facie*, by the acknowledgment of the defendant in the bill, and proof of a sale of the same property by the defendant to Sawyer, in July 1879, the bill of sale being dated January 17, 1874, was *prima facie* entitled to recover of the defendant the value of the property at the time of the sale to Sawyer.

To control the plaintiff's case, the defendant was allowed, under exception of the plaintiff, to introduce parol evidence, which he claimed tended to show that the transaction was not a sale, but a mortgage, or pledge, and was without consideration. We are of opinion that this evidence, so far as it was admitted for the purpose of varying, explaining or controlling the bill of sale, was incompetent in an action at law, and should have been rejected. *Pennock* v. *McCormick*, 120 Mass. 275. *Harper* v. *Ross*, 10 Allen, 332.

Whatever other effect the evidence introduced by the defendant might, if competent, have had upon the bill of sale, it failed to show any want of consideration. It tended to show that the bill of sale was given as part of the security for a loan of $250 from the plaintiff's intestate to the defendant, which was a good consideration.

The defendant's second and third requests for rulings relate to the effect upon the bill of sale of the evidence he was improperly allowed to introduce; and we are of opinion that he has no ground of exception that these rulings were not made. Because he had succeeded, under objection, in introducing incompetent evidence, he was not entitled to except because the court did not give it the force he claimed for it.

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The court without doubt ruled that the measure of damages was the value of the property at the time of conversion. The sale to Sawyer constituted the conversion, and not the refusal to deliver the property to the plaintiff upon a subsequent demand. The objection of the defendant, that the existence of the goods at the time of demand had not been proved, and that the suit could not be maintained, because at the time of the conversion (probably meaning demand) the defendant had no possession of the goods, or control over or interest in them, does not require notice.

There was evidence for the consideration of the court, upon the question of value, in the particular description of the property and the consideration recited in the bill of sale, and the fact that the defendant had sold the property. The weight of this evidence is not for us to determine.

Exceptions overruled.

THEODORE L. SAVAGE *vs.* CHARLES H. DAVIS.

Suffolk. Jan. 30. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

If a debtor, owning two cows, is entitled, after the seizure and removal of one of them on an execution against him, to elect which cow shall be exempt from execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 4, he must make such election within a reasonable time; and, if he fails so to elect, the officer may make an election for him, and he is bound by such election.

If one of two cows belonging to a debtor is seized upon an execution against him on the morning of one day, and is not removed from his premises until the evening of the next day, a jury would be warranted in finding that he had waived his right to elect which cow should be exempt from execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 4, by not making such election until six days after the removal.

A whip, owned and used by a debtor on his farm, is not exempt from seizure on execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 5, in the absence of special circumstances entitling him to hold it as so exempt.

TORT, for taking and carrying away the following articles, alleged to be the property of the plaintiff: one dark-colored cow, one farm-cart, one tip-cart, one cart harness, one whip, one farm-pung, and one buffalo-robe. The defendant, a deputy sheriff, admitted the taking, but justified under an execution

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in favor of Catharine Hayward against the plaintiff, by virtue of which he seized and sold the property in question; and alleged that the plaintiff waived his right, if he had any, to hold said articles, or any of them, exempt by law from seizure on execution. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff had another cow, which the defendant left on the premises as exempt from seizure under the statute, as he testified.

The defendant testified that the property was seized on the morning of February 27, 1880, and put in possession of a keeper, and was finally removed from the plaintiff's farm in Wakefield, in the evening of February 28, 1880, before the plaintiff had returned from his place of business in Boston. Evidence was offered tending to show that all the articles taken were in use, and necessary for use, on the plaintiff's farm, at the time of the levy.

The plaintiff offered evidence. which was contradicted by the defendant, that on March 6, 1880, and before the sale of said property, which occurred on that day, he gave the following notice to the defendant, dated March 5, 1880, and signed by him: "Sheriff Davis: I hereby give you notice that I claim the dark-colored cow, which you have under attachment in the case of Catharine Hayward *v.* myself, as exempt from attachment and execution under the statutes of this Commonwealth. I shall hold you strictly responsible for this cow, and I demand her instant return to me. I also claim, as exempt under the statute, the following other property taken by you from my premises, to wit: one farm-cart, one buffalo-robe and whip, and one cart harness. I demand the instant return of all of these articles also, and shall hold you strictly responsible for all of them."

The only evidence offered by the defendant of a waiver by the plaintiff of his election to have the dark-colored cow exempt, instead of the other one, related to an alleged waiver on March 6, 1880, and just before the sale commenced, and after the time when, by the plaintiff's evidence, the above notice was given.

The judge instructed the jury that they might lay out of consideration the farm-cart, tip-cart, cart harness, whip, farm-pung, and buffalo-robe, because neither one of those articles was exempt from being levied upon in execution; that if the

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plaintiff waived his rights, under the statute, to his exemption of the cow, he could not recover at all; that, independently of the question of waiver, the plaintiff had the right of election as to which cow should be exempt under the statute; that, if he failed to elect within a reasonable time, the defendant would have the right to make an election for him, and he would be bound by the defendant's election; that it was a question for the jury to determine whether the plaintiff exercised his right of election within a reasonable time, under all the circumstances of the case; that if he did not, in their judgment, so elect within a reasonable time, and they should find that the defendant in good faith made an election for him, then the plaintiff would be bound by the defendant's election, and would not be entitled to recover.

In relation to this last instruction the plaintiff contended that this was a matter of law, and not one of fact, and that the plaintiff could make his election at any time before the sale.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

P. H. Hutchinson, for the plaintiff.

S. K. Hamilton, for the defendant.

C. ALLEN, J. 1. Where a debtor was possessed of two horses, one of which was exempt from attachment, it was held in Maine that the debtor might elect which animal should be exempt. *Everett* v. *Herrin*, 46 Maine, 357. If such election may be made after the seizure and removal of one of the animals, it is reasonable to hold that it must be done so promptly as not to mislead the officer into the belief that the owner acquiesces in the selection which has been made. It is not necessary to show that the owner in express terms waived the privilege of making such election. The instructions were sufficiently favorable to the plaintiff to protect all his rights carefully, and led the jury to an apparently just result. Their finding that the plaintiff did not make his election within a reasonable time appears to us to have been right, as far as we can judge, in view of the controverted facts.

2. Of the articles sued for, no real claim is now made by the plaintiff except as to the whip; and no facts are shown which entitled him to hold this as exempt. *Exceptions overruled.*

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GURNEY PERCY *vs.* FRANCIS F. BIBBER.

Suffolk. Jan. 9. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

In an action of tort for fraudulent representations in the sale of a business, a letter from the plaintiff to the defendant, suggesting charges of false representations, and attempting to obtain a settlement, is inadmissible in evidence in favor of the plaintiff.

HOLMES, J. The exceptions pressed by the defendant relate to the admission of four letters from the plaintiff to the defendant, suggesting charges of false representations, and attempting to obtain a settlement. The plaintiff argues that, if he found the business which he bought of the defendant was not what it was represented, it was his duty promptly to call the defendant's attention to the fact; that the letters were competent to show that he made a claim upon the defendant, and the time and nature of the claim, and also to show his intention to rescind the contract. But the declaration is in tort for fraudulent representations only, although the writ sounds in contract also. It does not go upon a rescission and seek to recover the purchase money. If the plaintiff had a cause of action for deceit, he was under no duty to give any notice or make any demand, or to use other promptness than that prescribed by the statute of limitations. The fact that he promptly alleged that he had such a cause of action, or made a claim, or sought to rescind, is no more evidence in his favor than the fact that he alleges the same thing now. In *Atwater* v. *Clancy*, 107 Mass. 369, the plaintiff's letters seem not to have been objected to by the defendant.

It is further argued, that the letters were written under such circumstances that a denial or explanation would naturally be expected and called for. But no such circumstance is pointed out, nor do we discover any which would not make all accusations of fraud in a previous bargain admissible. The bill of exceptions does not state that any one of the letters, except that of May 31, was referred to in the subsequent conversations; and, as to that, we do not understand that what was said was put in evidence, or anything more than the fact that the letter was

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referred to, which was proved as evidence that the letter was received. *Exceptions sustained.*

H. H. Mather, for the defendant.

J. L. Eldridge, for the plaintiff.

JOHN J. C. SMITH & another *vs.* IRA L. MOORE & another.

Suffolk. Jan. 22, 23. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

The plaintiffs in a bill in equity were the members of an association, and trustees for it of a patent, which was sold to a third person for a certain sum, and the defendants were authorized to receive the money for the use of the shareholders. The defendants accepted the money on the terms of a receipt or covenant by which they agreed to hold it until certain documents and the great seal of the patent were delivered to the purchaser, and to repay the money to him if all the things mentioned were not done as agreed. These things were not done, and the purchaser notified the defendants to retain the money. *Held*, that the defendants accepted the money as stakeholders for both parties until the conditions were fulfilled; and that the bill could not be maintained.

HOLMES, J. The plaintiffs were the members of an association or partnership, and trustees for it of an English patent. This patent was sold to one Mackintire for £800, and the defendants were authorized to receive the money for the use of the shareholders. They received it, as will be explained. The facts, except those touching the receipt, are set forth more at length in *Smith* v. *Moore*, 129 Mass. 222. Since that decision, the action has been changed into a suit in equity on behalf of all the members of the partnership; and it now appears that the defendants accepted the money on the terms of a receipt or covenant, by which they agreed to hold it until certain documents and the great seal of the patent were delivered to Mackintire, and to repay the money to him if all the things mentioned were not done as agreed. These things have not been done, and Mackintire has notified the defendants to retain the money.

The plaintiffs seek to divide the terms of the receipt; and argue that, in receiving the money, the defendants acted as agents within the authority given them by the association, but that they made the covenant to retain and in one event to repay without authority, and on their own behalf alone. Hence, the

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plaintiffs say, the rule applies that an agent cannot set up a *jus tertii*. But it is very clear that we must look to the whole instrument in order to find out in what capacity the defendants hold this money, and to what extent Mackintire has parted with his dominion over it. It is manifest, from what has been stated of the receipt, that the defendants did not make themselves agents to hold for the association. They accepted the fund as bailees or stakeholders on behalf of both parties until the conditions were fulfilled. Assuming that the plaintiffs by their indenture with Mackintire got his covenant to pay the price, and not a mere right to rescind their conveyance if he did not, and assuming further that the defendants' only authority from the association was to receive an unconditional payment out and out, the plaintiffs can only set up a title to this specific sum on the terms and footing upon which Mackintire parted with it, and the defendants accepted it. These terms subjected the plaintiffs' right to a condition which has not been fulfilled.

Bill dismissed.

J. H. Young, for the plaintiffs.
D. B. Gove, for the defendants.

HENRY B. WILLIAMS *vs.* BOSTON WATER POWER COMPANY.

Suffolk. Jan. 26. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

A deed described a parcel of land in a city as bounded and described according to a certain plan, and gave the metes and bounds, the front line being on a street named, one of the side lines being on a street described as a street forty feet wide, and the rear line being on land of a railroad corporation. The plan showed that part of the rear line was a curved line; that on the other side of the street forty feet wide was a lot of land with a frontage of two hundred and sixty feet; that in front of this lot was an open triangular space formed by the street in front of the lot and another street approaching at an acute angle, the side lines of the streets next to this space not being shown. These streets and the open space were owned by the grantor. The streets and the land were then only in part filled and graded. *Held*, that the grantee did not have the right to have the triangular piece kept open.

BILL IN EQUITY, filed December 6, 1880, by the owner of a lot of land in Boston, marked B on the plan printed in the

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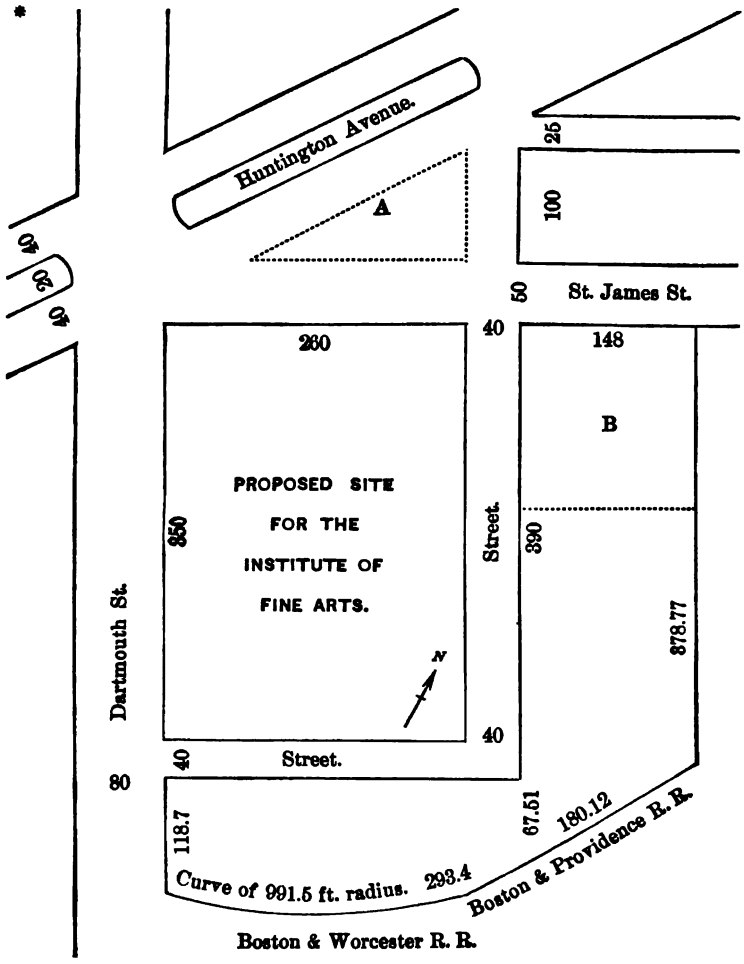
margin,* against the owner of the triangular lot of land enclosed in dotted lines, and marked A, on the same plan, for an injunction to restrain the defendant from ever building on said lot, and for further relief. The bill contained the following allegations:

1. By deed dated June 20, 1866, and duly recorded on June 28, 1866, with Suffolk deeds, libro 881, folio 96, the defendant conveyed, with all the privileges and appurtenances thereto belonging, to Nathan Matthews, a certain parcel of land, described in said deed as follows: "A certain piece or parcel of land



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situated in that part of the city of Boston called the Back Bay, bounded and described, according to a plan recorded herewith, as follows, viz.: beginning at a point on the southerly side of St. James Street one hundred feet westerly from Clarendon Street, and running southerly on land of M. D. Ross, three hundred and seventy-eight $\frac{77}{100}$ feet, to land of the Boston & Providence Railroad; thence turning and running southwesterly on land of said railroad, and on land of Boston & Worcester and Boston & Providence Railroads, four hundred and seventy-three $\frac{63}{100}$ feet, to Dartmouth Street; thence turning and running northerly on said Dartmouth Street one hundred and eighteen $\frac{70}{100}$ feet, to a street forty feet wide; thence turning and running easterly on said street forty feet wide three hundred feet; thence turning and running northerly three hundred and ninety feet, to St. James Street, on a street forty feet wide; thence turning and running easterly on said St. James Street one hundred and forty-eight feet, to the point of beginning."

2. By deed dated April 9, 1868, and duly recorded on April 15, 1868, Matthews conveyed to Lyman Nichols the northerly portion of said land, being that marked B on the plan printed in the margin of the preceding page, and described in said deed as follows: "A certain piece or parcel of land, situated in that part of the city of Boston called the Back Bay, bounded and described according to a plan recorded with deed from Boston Water Power Company to me, dated June 20, 1866, with Suffolk deeds, lib. 881, fol. 96, as follows, viz.: "Beginning at a point on the southerly side of St. James Street, one hundred feet westerly from Clarendon Street, and running southerly on land now or late of M. D. Ross, one hundred and fifty feet, to land of Peter T. Homer; thence turning and running westerly on land of said Homer, one hundred and forty-eight feet, to a street forty feet wide; thence turning and running northerly on said street forty feet wide, one hundred and fifty feet, to St. James Street; thence turning and running easterly on said St. James Street, one hundred and forty-eight feet, to the point of beginning; and contains twenty-two thousand two hundred square feet."

3. By deed dated March 1, 1880, and duly recorded on the same day, the executors of, and trustees under, the will of

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Nichols conveyed the premises last described to the plaintiff, the description thereof being the same as in said deed to Nichols; and the plaintiff is now the owner of said land.

4. At the time of the conveyance to Matthews all the land represented on said plan as lying north of the lot designated as a "Proposed site for the Institute of Fine Arts," and between said site and Huntington Avenue, together with and including St. James Street, the forty-foot street and Huntington Avenue, was owned by the defendant.

5. It appears on the face of the plan annexed to said deed of the defendant to Matthews, that all the land lying northwest of the plaintiff's lot is an open square, highway or place of some kind, which square, highway or place is either a part of Huntington Avenue, or is an open square bounding the lot of the plaintiff and connecting it with Huntington Avenue; so that, by virtue of said conveyance of the defendant to Matthews, there is attached to the plaintiff's lot the right of access to and from the same, over the open square, highway or place of some kind described above, and the right to have the same kept open as an open square, highway or place of some kind, so that there may be from the plaintiff's lot an unobstructed view over, and light and air from, the same, and all other benefits thereof.

6. In pursuance of its duty in the premises, and to carry out and effectuate said easement and rights, the defendant conveyed to the city of Boston, for public highways and other public uses, in the years 1875 and 1876, by deeds duly recorded, all the land referred to in the preceding paragraph except a triangular parcel lying in the midst thereof, as follows: 1. A small parcel of land curved in shape, adjoining said Institute site on the north, for the purposes declared in its previous deed to the city of the Institute site, and to form a part of the open ground in front of the building to be erected thereon. 2. A strip of land fifty feet wide, lying directly in front of said Institute site, as added to as aforesaid, and running east and west, for a continuation of St. James Street, and the same is now called St. James Avenue. 3. A strip of land forty feet wide and one hundred feet long, running north and south, lying directly west of a lot which lies north of the land of the plaintiff, and is separated from it by St. James Street, for a continuation of said forty-foot street,

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and the same is now called Trinity Place. 4. A strip of land one hundred feet wide, embracing the enclosed space marked on said plan as "Huntington Avenue," and running from Dartmouth Street in a northeasterly direction, for a continuation of said Huntington Avenue, and the same is now so called. All of these grants have been duly accepted by said city; but the remainder of the open land lying north of the Institute site, being a parcel triangular in shape, and enclosed by the aforesaid portions of St. James Avenue, Huntington Avenue and Trinity Place, is still owned by the defendant, and is still vacant land.

7. The plaintiff has erected upon his land, at great expense, six dwelling-houses of a very superior class, facing to the north, and the said houses and especially the most westerly of them, situate on the corner of St. James Avenue and the forty-foot street, command an unobstructed view over St. James Street and Trinity Place, and the intervening triangular piece of land aforesaid, to Huntington Avenue, and have a direct access to the same.

8. The defendant is beginning to build upon the said triangular piece of land dwelling-houses of the usual height, whereby the light and air coming to the plaintiff's said houses will be greatly diminished, the prospect from the same cut off, the access of the same to Huntington Avenue directly obstructed, and the value of the same greatly impaired.

The answer admitted the first four allegations of the bill; denied that by the deed to Matthews, who was then president of the defendant corporation, it conveyed to him any right or interest in, to or over said triangular parcel of land; that by the deed to Matthews and the plan recorded therewith, or in any other way, it ever agreed with Matthews, or any one, that said triangular piece of land should be kept open, or that Matthews or his assigns should have any rights to, in or over the same.

The answer also alleged that, before the plaintiff purchased of the executors of Nichols, Huntington Avenue, St. James Avenue and Trinity Place were constructed as streets of the usual grade of streets on the Back Bay; that, when the streets were filled, said triangular piece was filled to a less grade, namely to the usual grade of land on the Back Bay intended for building

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purposes; that the defendant made to the city of Boston conveyances of the streets as alleged, but not in performance of any duty, or to carry out and effectuate any easements or rights of the plaintiff or his grantors; and that the defendant was about to erect a building on the triangular piece of land.

The case was referred to a master, to report all the facts bearing on the issue, which either party desired. The master reported the following facts:

The deed dated June 20, 1866, from the Boston Water Power Company to Matthews, was delivered and recorded on June 28, 1866, and no plan was ever annexed to the original deed. On or about June 22, 1866, the Boston Water Power Company employed one Fuller, a civil engineer, to make a plan of the premises, and on that day, and on the twenty-third and twenty-seventh days of the same month, Fuller made calculations of area and did other work upon such plan. Fuller completed the plan on July 5, 1866, and on or after that day the plan was left at the Suffolk registry of deeds for record. This plan is now pasted in volume 881, folio 96, at the registry of deeds, on a page containing the record of the aforesaid deed, and there is written on the plan, in the handwriting of Andrew Cazneau, who in 1866, and before and after, was office clerk at said registry, the following letters and figures: "Lib. 881, fol. 96." This plan was in course of preparation, and was the one contemplated and anticipated by the parties to said deed when they used the language therein, "according to a plan recorded herewith," and at the time of the execution and delivery of said deed.* Instances are not uncommon in the Suffolk registry of deeds where parties leaving deeds for record announce to the register that plans which are to be recorded therewith have been forgotten or are not quite ready, and such plans are brought in and left for record subsequently to the leaving for record of the deeds. No evidence was adduced as to whether the parts of the plan which show more land than that described

* Annexed to the master's report was a copy of the plan referred to. The plan printed in the margin of page 407 is a copy of it, with the addition of the letters A and B, the dotted lines enclosing the triangular space, and the dotted line below the letter B, which shows the southerly boundary of the plaintiff's land.

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in the deed were agreed to, or known to either party to the conveyance.

In June 1866, the land conveyed to Matthews and now held by the plaintiff was substantially all graded. The proposed site for the Institute of Fine Arts, and the land to the north of it, were partially graded only. Of the streets in the neighborhood, Huntington Avenue, as now located, had, in June 1866, been determined on, to be one hundred feet wide, but had not then been graded at all. Boylston Street (which runs east and west, and lies immediately north of the land shown on the plan) had then been graded and constructed to a point about eighty feet westerly of Dartmouth Street. A passageway, about twenty-five feet wide, parallel with and northerly of St. James Avenue, had been graded to a point westerly of the said triangular piece of land: this passageway ran through the lot north of St. James Street and east of the triangular piece of land, is now owned by Trinity Church, and has been discontinued; its southerly line, which was about twelve feet north of the northerly angle of said triangular piece of land, was the dividing line between the land then owned by the Commonwealth and that owned by the defendant. St. James Avenue, fifty feet wide, in June 1866 had been graded to a point from one hundred and fifty to two hundred feet westerly of Clarendon Street, (which lies easterly of the land shown on the plan, and is parallel to Dartmouth Street,) and said grading overlapped about seventy-five feet the land now owned by the plaintiff. The streets about the lot of the Institute of Fine Arts had not been graded. The triangular lot of land, together with the surrounding streets, was graded by the defendant in the latter part of 1866; said piece was in part graded by the grading of the streets surrounding it, but other filling was done thereon besides that done upon the streets. In March 1869, this triangular piece, Huntington Avenue and St. James Avenue had been graded to substantially the same level, but by whom and at whose expense did not appear, nor did it appear how long this state of things had existed.

No claim against the defendant of any right in said triangular piece was ever made by Matthews or by Nichols; nor was any right therein mentioned in the negotiations between the defendant and Matthews when he purchased his lot. At that time

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Matthews was president of the defendant corporation, and continued to be its president until May 1869. Nichols became a trustee under an indenture of mortgage executed by the defendant in February 1874, and so continued till his death in 1879, and during said period was in the office of the defendant corporation two or three times a week, and had frequent consultations with its officers. In June 1866, at the time of the conveyance to him, Matthews knew that the streets herein mentioned had been decided on as they now exist, both as to width and location; and, as president of the defendant company, he afterwards included the said triangular piece in the assets and valuation of the company, and said company has paid taxes and betterment assessments thereon. Several years prior to the time when the plaintiff purchased his lot of land, the triangular piece was fenced by the defendant, and, at the time of his purchase, the plaintiff knew that the triangular piece of land was enclosed by a fence; he supposed it was always to be kept open, but knew that this was disputed. The angles of the triangular piece have been rounded off by the city, and it paid for the land so taken.

The case was heard by *C. Allen*, J., on the pleadings and the master's report, and reserved for the consideration of the full court, such decree to be entered as justice might require.

J. C. Ropes & J. C. Gray, for the plaintiff. 1. Where a deed refers to a plan, the plan must be considered as making a part of the contract, so far as is necessary to aid in the description of the rights intended to be conveyed. "All the particulars appearing on the plan and applicable" to the lot conveyed "are to be regarded as if they had been fully set forth in the deed." *Boston Water Power Co.* v. *Boston*, 127 Mass. 374, 376. In the case at bar the plan represents St. James Avenue or Huntington Avenue as expanding into a square at the northwest corner of the plaintiff's lot. This is a "particular" "appearing on the plan," and "applicable" to the lot conveyed, — in fact of the greatest consequence to it. The case is governed by *Farnsworth* v. *Taylor*, 9 Gray, 162.

2. The master found that, at the time of the conveyance to Matthews, all the ways represented on the plan as surrounding the lot conveyed were owned by the defendant, and that on the

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north and west of the lot these ways had not been constructed. This disposes of the suggestion that the plan was made only for a convenient description of the curved line on the southerly boundary, and compels to the conclusion that for his rights of way on the north and west of his lot the plaintiff must have recourse to the plan; and the plan shows an uninterrupted access from the northwest corner of the lot to Huntington Avenue. That some right of access to Huntington Avenue is granted to the plaintiff by the plan is not denied; that the extent of the plaintiff's rights is determined by the plan, and cannot be restricted by the defendant, is well settled. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. *Thomas* v. *Poole*, 7 Gray, 83. *Rodgers* v. *Parker*, 9 Gray, 445.

3. The plaintiff's case differs from that of Brown, in 127 Mass. 374, in this, that the rights of way on the northwest of his lot, which the plaintiff insists can be gathered only from the plan, are absolutely necessary to the use and enjoyment of his lot.

4. The fact that the plan was not completed till after the deed was recorded is of no consequence. The only question is this: Was the plan the plan of the defendant? If it was the plan of the defendant, it is wholly immaterial whether it was or was not finished when the deed was recorded. See *Hedge* v. *Drew*, 12 Pick. 141; *Blaney* v. *Rice*, 20 Pick. 62; *Valentine* v. *Wheeler*, 116 Mass. 478.

D. Foster, for the defendant.

HOLMES, J. This is a second attempt to assert an easement over a small piece of land, which was before the court in *Boston Water Power Co.* v. *Boston*, 127 Mass. 374. The land in question is a triangular piece lying in the acute angle between Huntington Avenue and St. James Avenue (formerly St. James Street) where they meet, on the territory recently reclaimed from the Back Bay in Boston. It is bounded on the other side (easterly) by a forty-foot way, now called Trinity Place. The present plaintiff owns an estate to the southeast of the triangle, and separated from it by the intersection of St. James Avenue and Trinity Place, which cross each other at right angles. He derives his title through a deed from the defendant to Matthews conveying a large tract, of which the plaintiff's

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estate is a portion. The material part of this deed was in these words: "bounded and described, according to a plan recorded herewith, as follows, viz.: . . . . thence turning and running northerly, three hundred and ninety feet, to St. James Street, on a street forty feet wide [now Trinity Place]; thence turning and running easterly on said St. James Street, one hundred and forty-eight feet." The plan referred to, like that in the former case, shows the street lines opposite the triangle in question, but does not enclose the triangle, and the plaintiff founds his claim upon this fact. Perhaps it should be added, that the plan has some marks of completeness to the westward of the triangle, on the farther side of it from the Matthews tract, which is an argument, as far as it goes, that leaving the nearer space unenclosed amounted to a declaration that it was to remain open. But we are of opinion, upon inspection of the plan and the construction of the deed, that no such right was attached to the land conveyed to Matthews.

The lines on the opposite sides of the ways enclosing the triangle cannot be taken to mean that all within them shall be open. They are side lines of streets, and extend in the same directions as far as the streets are shown on the plan. They are put down irrespective of their accidental relation to each other by reason of which they enclose a parcel of land. They mean no more in this place than at any other point in their course. They cannot be dealt with like a triangle drawn as such, and are wholly unlike two lines obviously drawn in relation to each other for the purpose of indicating a street between, as in *Farnsworth* v. *Taylor*, 9 Gray, 162. In this case the omission of any one of the three lines would not affect the propriety of inserting the others. It is true that there are no inner street lines enclosing the triangle; that the plan shows, by the street names and otherwise, that some land around the triangle was intended to be open; and that there is nothing except the equal width of the streets elsewhere to show where, if anywhere, the lines were to be drawn. But the absence of lines, if under any circumstances it could be sufficient to establish an easement in cases like the present, in this instance rather suggests uncertainty as to the details of the ultimate laying out of the land, and did not sufficiently and clearly say to Matthews, This space

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is forever to remain vacant. If the plan had only shown the side lines of the forty-foot street and of St. James Street, obviously no inference could be drawn that an indefinite space was to be kept open. The line of Huntington Avenue does not change the case, because it is not inserted with that intent. Its primary object is to mark the course of the avenue, and it does not necessarily import any other purpose. If the enclosed space had been considerable, the question would hardly have been raised. The fact that it is small makes no difference in the legal effect of the plan. In short, while it is undoubtedly true that the plan did not show any affirmative intention to enclose or build upon the triangle in question, we think that it is also true that the plan failed to assert a contrary intention so definitely as to give Matthews an easement.

Our opinion is confirmed by the words of the deed, and the circumstances at the time it was executed. The precise form of reference to the plan is to be noticed. It is "bounded and described, according to a plan," &c. These words are satisfied if the reference to the plan be taken to have been for purposes of boundary and description. As was pointed out by the defendant's counsel, the curved boundary to the south could not have been described otherwise so easily as by delineation. Plans are constantly used for this purpose, and there is no presumption that a reference to one enlarges or adds to the easements otherwise conveyed. In *Farnsworth* v. *Taylor*, *ubi supra*, the plan was referred to for the street in controversy.

The deed gave Matthews a forty-foot way on one side of his tract next the triangle, and St. James Street on the other. This was fifty feet wide as far as laid out, and was intended to be of that width until it reached the forty-foot street. Without inquiring too nicely as to the limit of the easements created by the words alone, it is clear that, applied to the land, as they might have been perfectly well, without the plan, the words would not have given Matthews what the plaintiff claims. Yet they deal with the subject matter. It is somewhat harder to enlarge their scope, or to add to them by reference, than it would be to import an easement where the deed was silent.

The tract conveyed to Matthews, after stretching three hundred and ninety feet to the south from St. James Street, turned

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at right angles, and extended westerly three hundred feet, to Dartmouth Street, in the rear of the proposed site of the Museum of Fine Arts, which lay between that portion of the Matthews parcel and the triangle. If the plaintiff's argument be correct, the easement was annexed to the whole of this estate, although useless to the greater part of it. The plaintiff makes no attempt to introduce any principle of apportionment on the ground that the parcel was manifestly destined to be cut up into building lots.

Passing now to circumstances outside of the deed and plan, Matthews was the president of the defendant corporation. Just north of the triangle, almost touching it and parallel to St. James Street, was the line of division between the defendant's lands and those of the Commonwealth; so that while it was known to have been determined that Huntington Avenue should be one hundred feet wide, so far as appears, it was open to the State to change its plans with regard to the portion directly to the north, and thus to necessitate some corresponding changes on the part of the Water Power Company. Again, so far as appears, the land to the south was only the "proposed" site for the Institute of Fine Arts; and here again changes were possible. Most of the land in question had not been graded, and some of it was still under water. These facts explain a certain degree of vagueness in the plan, and are against its being interpreted as creating an easement by implication.

Taking the circumstances, the mention of the ways in the deed, the form of reference to the plan, and the plan itself, as it appears on inspection, into account, we have no doubt with regard to our conclusion.

We have considered the case apart from another fact, which would of itself be a serious obstacle in the way of the plaintiff's recovery. The deed was recorded on June 28, 1866. The plan, instead of being recorded with it, was not even completed until July 5. Without otherwise insisting on this fact, we think that it lends additional confirmation to the construction which we have adopted. If the plan had been referred to in terms as one to be completed thereafter, it would hardly be contended that it was to be construed as enlarging or adding to the easements granted by the words of the deed. The difficulties are equally

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great in giving such a construction to a plan which was in fact not yet completed.

As Matthews got no title legal or equitable to the alleged easement, the plaintiff could take none. *Bill dismissed.*

DANIEL S. BENJAMIN *vs.* C. A. DOCKHAM.

Suffolk. Feb. 1. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

A declaration for the price of milk delivered to the defendant, at his request, is supported by proof of a delivery to the defendant's wife, while living apart from him, without means of support, by reason of his cruelty.

HOLMES, J. The plaintiff's declaration was for milk delivered to the defendant by the plaintiff at the defendant's request. His proof was of a delivery to the defendant's wife, who was living apart from her husband, without means of support, by reason of his cruelty. The only ground of exception which we are asked to consider is, that there was a variance between the declaration and proof. If there were such a variance, as the case has been tried on its merits, and it appears from the statement of the defendant's counsel himself that there can have been no surprise, an amendment would be allowed. *Peck* v. *Waters*, 104 Mass. 345, 351. *Cleaves* v. *Lord*, 3 Gray, 66. But we think no amendment is necessary. The allegation of delivery to the defendant would seem to be sufficient in a common count, even when the delivery was to a third person at the defendant's request. *Bull* v. *Sibbs*, 8 T. R. 327, 328. 2 Chitty Pl. (7th ed.) 47, n. *l*; (6th ed.) 56, n. *w*. *A fortiori* when it was to the defendant's wife, who at common law is one person with her husband. *Ross* v. *Noel*, Bull. N. P. 136. *Ramsden* v. *Ambrose*, 1 Stra. 127. And in those cases where the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency, and her request is his request.

Exceptions overruled.

C. P. Weston, for the defendant.

S. H. Dudley & W. P. Dudley, for the plaintiff.

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DANIEL A. GLEASON *vs.* GORDON McKAY.

Suffolk. Nov. 20, 1882. — March 5, 1883. DEVENS & HOLMES, JJ., absent.

The St. of 1878, *c.* 275, extending the provisions of the St. of 1865, *c.* 283, so that they shall apply "so far as applicable, to companies, copartnerships and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer;" and providing that the tax provided for in the St. of 1865, *c.* 283, "shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations," so far as it applies to a partnership in which, by agreement of the partners, the interest of each member may be transferred without the special assent of the other members, is unconstitutional.

CONTRACT by the treasurer of the Commonwealth against the trustee of the McKay Sewing Machine Association, to recover a tax assessed upon said association for the year 1879, in pursuance of the St. of 1878, *c.* 275. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows:

Previously to May 10, 1866, Gordon McKay had acquired, by invention, assignment or license, interests in letters patent of the United States for improvements in machinery for sewing the soles of boots and shoes to the vamps, and had been carrying on the business of manufacturing machines under these letters patent, and licensing shoe manufacturers to use them. From the proceeds of the business, he had purchased land in Lawrence, and built a machine-shop on it for the manufacture of such machines, and accumulated some personal property. The legal title in the business and in all the property, both real and personal, including the interests in the letters patent, was and has continued to be in himself; but other persons were and are equitably interested in various proportions.

On May 10, 1866, McKay executed an instrument under seal,* in which, after reciting the foregoing facts, he declared that he had held and should continue to hold the business and property

* A copy of this instrument was annexed to the statement of facts; its material provisions are recited in 105 Mass. 521, 522.

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in trust for the benefit of all persons who were or might become interested therein, upon the terms and conditions therein set forth.

Upon the execution of this instrument by McKay, all the persons then interested in the property or business signed an agreement in the following terms: "In consideration that the said Gordon McKay has agreed and does hereby bind himself and agree to deliver to each and every party having an interest in the property set forth in the foregoing certificate and declaration of trust, a certificate and declaration similar to the foregoing, expressing the several interests of each party, in case all of the persons interested in said property shall sign this agreement, we do hereby severally bind ourselves and agree to receive from said McKay such certificate and declaration of trust, as the sole evidence of our respective interests in the above-described property; and upon the receipt thereof, any other certificate or evidence of title which we may hold to said property shall become cancelled and void, and the same shall be surrendered to him, the said McKay."

Each person then interested received a certificate, signed by the trustee, certifying that he was the owner of a certain number of shares "in the property of the McKay Sewing Machine Association," and that the "shares are transferable by an assignment in writing on this certificate, and a surrender of this certificate to the trustee."

After the execution of the papers, and issue of the certificates, the shareholders, on May 28, 1866, held a meeting, as provided for by the declaration of trust, and chose an executive committee and adopted by-laws for the regulation of the business of the association.

Since said date, the business of the association has been conducted by its executive committee under the provisions of said declaration and by-laws, McKay holding the legal title of all its property as trustee, under said declaration, the title of the property never having passed from him. The place of business of the association is and always has been in Boston, except that it has a factory in Lawrence for the manufacture of machines and tools. Except its machine-shop in Lawrence, and the tools and machinery connected therewith, the property of the association

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and the value of its shares consist chiefly of its interests in the letters patent.

Its income is chiefly derived from license fees received from licensees of its machines, and the net amount of this income is divided from time to time, generally quarterly, among its members, in proportion to their respective shares or interests.

Its machines are all leased under a form of lease, the legal title to them remaining in McKay as trustee. On May 1, 1879, there were 1216 of these machines in the hands of licensees, distributed throughout the United States; and the interest of McKay, trustee, and of said association therein, exclusive of the interest of the lessees, was taxed to said trustee for that year, in Boston, at the rate of $1 per machine. The total value of the machines at that date, May 1, 1879, was, on an average, $100 for each machine, which had been paid by each lessee on the delivery of the machine to him. By a provision in all of said leases, the lessee upon the termination of the lease, if he has complied with its terms, is entitled to the machine absolutely, upon the payment of $1 to the trustee.

Whenever a member sells his shares, or any of them, new certificates are issued to the purchaser, and such purchasers thereupon become members of the association. Said shares are frequently sold, and such sales reported at auction sales in Boston, and are subject of transfer upon assignment of certificates of shares, as set forth in said certificates; and, upon such assignment, the assignee is entitled to receive new certificates, and to demand and receive of the association his proportionate share of the net profits of the association, under said declaration and by-laws. Such shares are held by the person holding the certificate thereof, free from the control of any other person, and are subject to no restrictions or conditions whatever, except such as are set forth in said certificate and declaration of trust.

McKay, as trustee of said association, was taxed for its real estate, machinery and tools in Lawrence for the year 1879, as well as in all previous years, and the tax was duly paid; said real estate was assessed at $63,500, and said machinery and tools at $71,216. He was also taxed in said year, as in all previous years, in Boston for the personal property held by him for said association, consisting of office furniture, money on hand, book

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accounts and interest in said machines in the hands of licensees, all valued at $52,291.99, and upon which he duly paid the assessed tax, amounting to $653.75. This valuation did not include the interests in the letters patent held by him, it being contended by the trustee that letters patent of the United States were not subject to taxation.

The tax sought to be recovered in this action, $14,253.33 was assessed upon the aggregate value of the shares of the association on May 1, 1879, as ascertained by the tax commissioner in pursuance of the provisions of the St. of 1865, *c.* 283, after deducting therefrom only the value of said real estate, machinery and tools taxed at Lawrence, said assessed valuation being $1,115,284.

Upon notice of said taxation, the said trustee, in behalf of the association, duly applied to the board of appeal for a correction of said tax, upon the ground that said valuation and assessment included the interest in said letters patent, and also the personal property taxed in Boston, as it did in fact, at the same time claiming that no tax whatever was assessable against said trustee or association. Upon the hearing, the foregoing facts appeared; but the board of appeal declined to reduce or alter the amount of said valuation or assessment.

C. H. Barrows, Assistant Attorney General, for the plaintiff. The St. of 1878, *c.* 275, may be declared constitutional:

First. As imposing an excise on the franchise of an unincorporated association, the franchise belonging to the association as an aggregate. Unincorporated entities, as distinct from partnerships, have long been recognized. Laws of Alfred (Thorpe's Anc. Laws & Inst.) 27, 28. Smith on English Gilds, *passim*. Class Tax Act, 1782. Rev. Sts. *c.* 7, § 46. *Oliver* v. *Liverpool & London Ins. Co.* 100 Mass. 531, 540. *Hill* v. *Boston*, 122 Mass. 344, 349.

Second. As imposing an excise on the privilege or commodity of associating in a peculiar way, being the privilege of the individual members of the association. Any class of legal rights may be selected for taxation, whether such rights are conferred by statute or by common law; and their enforcement through the courts is a privilege which may be the subject of excise. A tax on traders' licenses rests on this ground. *Portland Bank*

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v. *Apthorp*, 12 Mass. 252. *Tarde* v. *Benseman*, 31 Tex. 277. *Young* v. *Governor*, 11 Humph. 147. A tax similar to that in the case at bar might be laid on the peculiar form of partnership described in the Pub. Sts. *c.* 75.

Third. As imposing a tax on a newly declared form of property.

Fourth. As imposing a tax on property that is proportional in the sense intended by the Constitution.

E. Merwin, for the defendant.

MORTON, C. J. The principal question in this case is whether the St. of 1878, *c.* 275, as applied to the defendant, is constitutional. The first section of the statute provides that "Chapter two hundred and eighty-three of the acts of the year one thousand eight hundred and sixty-five, and the acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter two hundred and eighty-three shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

The power of taxation, using the word in its generic sense as including all rates and impositions laid or levied upon the people, is conferred upon the Legislature by the Constitution, and is to be held and exercised subject to the limitations imposed by the Constitution. *Oliver* v. *Washington Mills*, 11 Allen, 268. The Legislature is given the power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth," and also power "to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same." Const. Mass. *c.* 1, art. 4.

It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It

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does not purport to do this. It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. *Murray* v. *Berkshire Ins. Co.* 104 Mass. 586. *Commonwealth* v. *Hamilton Manuf. Co.* 12 Allen, 298. Regarded as a tax on property, the tax we are considering would be invalid because not proportional; it would be an imposition upon certain property at a rate different from that to which other property in the Commonwealth is subject. But, as we have said, it does not purport to be a tax on property. In levying an imposition under this statute, no inquiry is made as to what property liable to taxation any copartnership, or other association which comes within its terms, has. Such property remains liable to taxation under the general laws. This imposition is based "upon the aggregate value of the shares of said capital stock." Such shares, if they can be said to be property, are not the property of the copartnership or association which is taxed, but of the individual partners or shareholders. It is very clear that this was intended as an excise upon some franchises or privileges sought to be held by the copartnerships or associations in supposed analogy to the franchises of corporations. And the question is whether this imposition can be upheld as such excise within the second clause of the Constitution, cited above. In this clause, there are two limitations upon the power of the Legislature in imposing excises. They must be reasonable, and they must be excises upon some produce, goods, wares, merchandise or commodities, brought into, produced, manufactured, or being within the Commonwealth.

It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the term "commodities," in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the Legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and

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subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the Legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or quasi public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license. *Portland Bank* v. *Apthorp*, 12 Mass. 252. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth* v. *Hamilton Manuf. Co. ubi supra*. *Commonwealth* v. *Cary Improvement Co.* 98 Mass. 19. *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161.

This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicil. *Hoadley* v. *County Commissioners*, 105 Mass. 519. It enjoys no franchises conferred upon it by the Legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the Legislature.

If this tax can be upheld, it seems to us that the necessary result will be that the Legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word "commodities" beyond any reasonable

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limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the Legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people.

We are therefore of opinion that the St. of 1878, *c.* 275, so far as it applies to the defendant, is unconstitutional.

Judgment for the defendant.

JAMES SCHOULER, petitioner.

Suffolk. Nov. 23, 1882. — March 5, 1883. DEVENS & HOLMES, JJ., absent.

A testator by his will authorized a person named to withdraw the contents of the testator's bank-book from a certain bank after his death, "said money to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." *Held*, that the nominee was not to take the money for his own use; that the will created a valid trust "for charitable purposes, masses or other charitable uses;" and that, the nominee having died without qualifying as trustee, the court might appoint a successor, who should administer the trust according to the directions of the will.

PETITION IN EQUITY, by the administrator, with the will annexed, of the estate of Catharine Powers, for the construction of said will. Notice was ordered by publication to all persons interested under said will. The only persons who appeared were the Attorney General, in behalf of the Commonwealth, claiming title by escheat, and Archbishop Williams, who had been appointed trustee. Hearing before *C. Allen*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

P. A. Collins, for the trustee.

MORTON, C. J. The will we are called upon to construe, written by an illiterate person, is as follows: "Boston, Sept. 27, 1857. I the undersigned do authorize the Rev. Thos. Lynch to withdraw the contents of my bank book $250.$\frac{56}{100}$ no. 93343.

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The Provident Institution for Savings in the town of Boston after my death being of sound mind, memory and understanding. Said money to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." If we disregard the punctuation, and supply a few words accidentally omitted, the main intention of the testatrix is sufficiently clear. Being unmarried and without any near kindred, her object was to devote to public charitable purposes, after payment of her funeral expenses, her money deposited in the Provident Institution for Savings, being the whole of her estate. The terms of the bequest clearly manifest the intention to create a trust in the Rev. Thomas Lynch. He is to take the estate, not for his own use, but to be disposed of for the purposes she directs. The omission of the words "in trust" is immaterial, as the intention is clearly manifested that the whole property shall be applied by the legatee for the benefit of other persons than himself. *Nichols* v. *Allen*, 130 Mass. 211, and cases cited.

The trusts defined by the will are that the property is "to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities. *Jackson* v. *Phillips*, 14 Allen, 539, 553. The abbreviation "&c.," equivalent to "etc." or "et cetera," imports other purposes of a like character to those which have been named. *Noscitur a sociis.* It is not the fair construction to hold that it imports that the trustee may apply the property to other purposes not charitable, at his discretion. This is not the necessary or obvious construction, and it defeats the main purpose of the testatrix, apparent in the will, to devote her property to charitable uses. We therefore construe the will as meaning that the trustee is to apply the residue to charitable purposes, masses or other charitable uses.

Though the specific objects of the charity are not named by the testatrix, but are left to the discretion of the trustee, the rights of the heirs at law, or of the Commonwealth by escheat, are devested. Such bequests are upheld as bequests to public charities. *Saltonstall* v. *Sanders*, 11 Allen, 446. See also

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Jackson v. *Phillips*, *ubi supra*; *Nichols* v. *Allen*, *ubi supra*; *Brown* v. *Kelsey*, 2 Cush. 243.

We cannot doubt that, if the Rev. Thomas Lynch had lived until the will was proved, he would have been entitled to the property, to be applied by him as trustee to charitable uses, as directed by the will. He died before the will was proved, and therefore did not qualify as trustee. But this does not defeat the trust. The main object and purpose of the testatrix was to devote her small estate to charity. She nominated her spiritual adviser as a trustee, with power to select the particular objects of charity. The will is very inartificial, but we think that her intention was that the power and discretion to select objects of charity should attach to the trust, and was not personal to the nominee; and that it is a case where the courts may properly supply a trustee, in order to carry into effect her main and controlling purpose. *Harvard College* v. *Theological Education Society*, 3 Gray, 280, 282. *Attorney General* v. *Andrew*, 3 Ves. 633. *Moggridge* v. *Thackwell*, 7 Ves. 36.

Archbishop Williams has been appointed as such trustee; and the administrator, with the will annexed, should pay over to him the property, with its accumulations, to be by him applied according to the directions of the will. *Decree accordingly.*

Thomas E. Proctor *vs.* Lydia C. Whitcomb.

Suffolk. Jan. 9. — March 5, 1883. Field & W. Allen, JJ., absent.

In an action against the indorser of a promissory note, payable at a certain bank, it appeared that the bank lent the maker of the note a sum less than the face of the note on the pledge of it; that subsequently the maker, while indebted to the bank in that sum, failed, and the bank procured from him a note for the amount of the loan, payable on demand, containing a clause declaring that the note in suit was held as collateral security for it, and that the bank might sell the collateral note on the non-performance of the promise, either at public or private sale; and that the second note was afterwards sold and transferred to the plaintiff, the note in suit, held as collateral security for it, being delivered with it to him. The plaintiff, who was called by the defendant, testified that he paid the full face value of the note thus bought, knew that the note in suit was collateral security for it, and received it as such. It also appeared that the plaintiff afterwards sold the note in suit for its full face value to a person

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who sought to collect its full amount, and who subsequently re-transferred it to the plaintiff. The plaintiff, who now sought to recover only the amount of the loan, asked the judge to instruct the jury that there was no evidence that the bank sold to the plaintiff absolutely the collateral security, or did anything more than to sell to the plaintiff the debt for which it held this security, and the interest of the bank in the collateral security, as such. *Held*, that this instruction should have been given.

CONTRACT upon a promissory note for $2500, dated January 9, 1877, payable four months after date, at the Eliot National Bank of Boston, to the order of the makers, Whitcomb and Thayer, and indorsed by them and by the defendant. At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. D. Ball & B. L. M. Tower, for the plaintiff.

R. M. Morse, Jr. & H. L. Harding, for the defendant.

DEVENS, J. The plaintiff requested the court to instruct the jury that there was no evidence that the bank sold to the plaintiff absolutely the collateral security, or did anything more than to sell to the plaintiff the debt for which it held this security, and the interest of the bank in the collateral security as such. A reference to the previous instruction given by the court shows that what the plaintiff meant, and what he must have been understood to mean, by an absolute sale, was a sale of the note signed by the defendant for $2500, separately from the transfer of the debt which it was intended to secure, and independently of its relation thereto.

There was evidence that the note on which this suit is brought, and on which the plaintiff now seeks to recover the sum of $1573.54, was one made by the defendant for the accommodation of Whitcomb and Thayer, to be used by them at the Eliot Bank; and that the latter sum was lent to them by the bank on the pledge of it. Subsequently, on July 9, 1877, Whitcomb and Thayer, being indebted to the bank for this sum, which then stood as an account, failed, and the bank procured from them a note of $1573.54, payable on demand, which contained a clause declaring that the $2500 note was held as collateral to it, and that the bank might sell the collateral note on the non-performance of the promise, either at public or private sale. This note was afterwards sold and transferred to the

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plaintiff, the note of $2500 held as collateral security for it being delivered with it to him. The plaintiff, who was called by the defendant, was the only witness who testified to the circumstances of this transaction; and he stated that he paid the full face value of the note of $1573.54, knew that the note of $2500 was collateral security for it as therein recited, and received it as such. The jury were certainly not bound to accept the statement of the plaintiff against other evidence, if such existed; but the note and that which was collateral to it were produced together by the plaintiff, and, if the defendant sought to establish that there had been an absolute and independent sale of the collateral security, it was for her to do so. Some affirmative evidence to show this was necessary. It was not afforded, even if it be conceded that the jury may not have given credence to the plaintiff's account of the transaction.

Nor, even if it does appear that the plaintiff, in purchasing the claim, hoped or expected that there was in the $2500 note an excess of collateral security, which he might in some way be able to apply so as to satisfy other claims which he held against the insolvents, or partially so, and that, seeking to obtain an advantage thereby, he afterwards sold the note of $2500 for its full face value to one who sought to collect its full amount, and who has since re-transferred it to the plaintiff, is evidence thus afforded of any absolute sale of the collateral security. The purpose that the plaintiff had in buying the claim, and the use sought to be made of the collateral security afterwards, do not supply evidence to control the fact that the claim and the collateral security were transferred together.

We are therefore of opinion that the instruction requested should have been given. We have not deemed it necessary to consider whether, if a sale of the $2500 note had actually been made as a separate and independent transaction, at the time when the transfer of it took place, such sale would have been illegal, and whether, if so, the illegality would have been of such a character that this action could not be maintained by the plaintiff for the amount for which it was held as collateral. These are questions involved in another instruction to which the plaintiff objects; but, at a subsequent trial, the case may be presented in a different aspect. *Exceptions sustained.*

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JOSEPH B. MOORS *vs.* STREET COMMISSIONERS OF BOSTON.

Suffolk. Jan. 10. — March 5, 1883. FIELD & W. ALLEN, JJ., absent.

Under the Gen. Sts. c. 11, § 25, after a person has seasonably filed a schedule purporting to be a true list of all his property liable to taxation, and has made oath to the same, the assessors have no right to add to such list other property for which they consider him taxable, and assess him thereon, without making any inquiries of him in relation thereto.

DEVENS, J. The petitioner, who brings this writ of certiorari for the purpose of revising the judgment of the street commissioners of Boston acting as county commissioners, in refusing to abate a tax laid by the assessors of Boston upon his property, had seasonably filed a schedule purporting to be a true list of all his property liable to taxation, and had made oath to the same. Whether any inquiries were then made of him does not clearly appear, but it is agreed that, if such were made, they were fully answered. Subsequently the assessors, hearing of two lots of personal property for which they considered him to be taxable, (not referred to in any inquiries made by them, if such were made,) added a description of the same to the schedule filed by him and assessed him thereon, no inquiries having been made by them in relation thereto. We have first to consider, therefore, whether the sworn return was conclusive upon the assessors under these circumstances, and thus whether they were limited to an assessment of the property returned by the petitioner.

The Rev. Sts. c. 7, § 22, were as follows: "The assessors shall receive, as the true valuation of the property of each individual, the list, if any, brought in by him according to the provisions of this chapter, unless he shall, on being thereto required by the assessors, refuse to make oath that the same is true." Under this statute, it was held that the word "valuation" was equivalent to "enumeration" or "statement," and not to "estimate of value;" that the value of his estate as estimated by the tax-payer was not conclusive upon the assessors, but that the enumeration, description and specification of his estate was to be so taken, unless the owner, on being required to make oath, refused to do so. He could not, therefore, be lawfully taxed for more property than he had inserted in his list, unless he refused

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to swear that he had no more. *Newburyport* v. *County Commissioners*, 12 Met. 211. *Winnisimmet Co.* v. *Chelsea*, 6 Cush. 477. *Lincoln* v. *Worcester*, 8 Cush. 55.

The Gen. Sts. *c.* 11, § 25, so far altered the law as to provide, referring to the assessors: "They shall receive as true the list brought in by each individual according to the provisions of this chapter, unless, on being thereto required by the assessors, he refuses to answer on oath all necessary inquiries as to the nature and amount of his property." The word "valuation" was thus omitted, and while under the former statute it was held that the return of the tax-payer should be adopted as conclusive, if, upon being required so to do, he made oath to its correctness, under the later statute the assessors were not bound to take his list as true, if by his sworn answers to their inquiries it appeared to be otherwise. The purpose for which inquiries by the assessors were authorized was that they might thereby correct the list, or disregard it if it appeared by an examination of the party that, from a mistake, oversight or otherwise, he had not sworn to a true list of his property. It was not conclusive as to property not included in it, which might be disclosed by such inquiries. *Newburyport* v. *County Commissioners*, *ubi supra*. *Hall* v. *County Commissioners*, 10 Allen, 100. *Great Barrington* v. *County Commissioners*, 112 Mass. 218.

A severe penalty was imposed by the St. of 1869, *c.* 190, (Pub. Sts. *c.* 11, § 29,) on any one intentionally making a false return or schedule as and for a true list of his taxable property, and by this list the assessors are bound, except as above stated. They cannot correct this list upon any information, however satisfactory, as to the existence of other taxable property, which is not communicated to the tax-payer. Having furnished them with his list under oath, he is entitled, before he can be assessed upon other property, to have them hear his statements or explanations in regard to it.

In *Charlestown* v. *County Commissioners*, 109 Mass. 270, it was held that the list returned to the assessors was not conclusive on one who, by mistake, included therein property which was exempt by law, and that he might properly apply for an abatement of the tax thereon. The respondents argue that, if such is the case, and if property put into the list can be struck

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out, property which is omitted can be inserted therein. But the power of the assessors or commissioners to abate the tax, when it is found that property for which the tax-payer is not liable is included in the assessment, and thus that he is taxed at more than his just proportion, is not limited by the fact that it had been erroneously inserted in his list. On the other hand, the assessors must take the list furnished them as true, unless they make the examination they are entitled by law to make, give to the tax-payer the opportunity intended to be afforded him by inquiry as to the nature and amount of property claimed to be subject to taxation, and then determine that the list should be corrected by the insertion of property erroneously omitted.

As the proceedings of the assessors were erroneous in imposing a tax upon property not included in the list of the petitioner, it is unnecessary to determine whether a tax could properly have been laid upon the merchandise which was the subject of it.

Certiorari to issue.

R. M. Morse, Jr. & H. L. Harding, for the petitioner.

T. M. Babson, for the respondents.

BRIDGEWATER IRON COMPANY *vs.* ENTERPRISE INSURANCE COMPANY.

Suffolk. Jan. 17. — March 5, 1883. FIELD & W. ALLEN, JJ., absent.

The fact that, at the time of making a contract of insurance, by an agent of the insured with an agent of an insurance company, a prior insurance by the same company existed on the same property, which was a material fact, and which was not known to either contracting party, will not avoid the contract, although the contract would not have been made if the existence of such prior insurance had been known at the time.

If, at the time of making a verbal application for insurance, the applicant produces a list of the existing insurance on the property sought to be insured, and states his honest belief that it is correct, and the insurance company has the means of verifying the statement, but fails to do so, and the list proves to be incorrect, this is not a misrepresentation of fact which will avoid a policy subsequently issued, containing an express warranty that all the facts and circumstances have been truly stated in the application, and a condition that, "if any material fact or circumstance shall not have been fairly represented," the policy shall be null and void.

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CONTRACT upon a policy of insurance against loss by fire, issued by the defendant company, dated April 3, 1880, for the term of one year, upon certain property of the plaintiff in Bridgewater, which was totally destroyed by fire on April 4, 1880. Trial in the Superior Court, before *Aldrich*, J., who reported the case for the determination of this court, in substance as follows:

An insurance broker residing in New Bedford, who had for some years acted as the agent of the plaintiff corporation in placing all its insurance, and who in that capacity was well known to the defendant's agents in Boston, applied to them, on April 3, 1880, for immediate insurance on property described in the policy declared upon, to the amount of about $18,000.

The defendant's agents were also agents for several other companies, some of which had already issued policies upon the plaintiff's property in Bridgewater up to a certain limit of the authority of these agents.

In the course of negotiations, the amount of risk already incurred by the companies represented by the defendant's agents was a subject of discussion, and was a material fact influencing the negotiation. The agent of the plaintiff exhibited a printed list, which he stated he believed was a correct list of the existing insurance on the plaintiff's property at Bridgewater; subsequently, the plaintiff's agent discovered that, by accident, he had taken the wrong list from his office in New Bedford. It contained the names of the companies, and the respective amounts of the existing policies upon said property. The name of the defendant company did not appear in this list.

The defendant's agents, relying upon this statement, and without referring to their own books and records, from which in a search of ten or fifteen minutes they could have ascertained whether said list was correct, made a verbal contract with the plaintiff's agent, by which the defendant corporation was then and there bound to insure the same property, in the same amounts, and on the same terms, as afterwards appeared in the policy subsequently issued on April 7, 1880, and declared upon in this action, until a policy could be conveniently issued.

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In fact, the defendant company had then a policy upon the plaintiff's property at Bridgewater for $7,225, and the policy in part covered a portion of the same property insured by the policy declared upon.

Neither the verbal contract would have been made, nor the second policy issued, if the existence of the prior policy had been discovered at the time of making the contract, or at the time of issuing the policy. The defendant's agents discovered this fact in an attempt to adjust the loss on April 12, 1880, and immediately demanded the return of the second policy.

The agents of each party kept records, from which correct information could be obtained, by examination, of the amount of insurance in each company represented by the defendant's agents; and the error in the statement by the plaintiff's agent was wholly unintentional.

The policy declared upon contained the following clause: "And the insured hereby covenants and engages, that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fairly represented, or if the assured shall have made or shall hereafter make any other insurance upon the said property, without the consent in writing by said company; . . . . in every such case the risk thereupon shall cease and determine, and the policy be null and void, unless confirmed by a new agreement thereupon written, after a full knowledge of such facts and circumstances."

No new agreement was made, but it was agreed that all the formal proofs required by the policy were seasonably presented; and the sole question was whether, under the statement made as herein set forth, any contract was made by which the defendant was bound or liable to the plaintiff.

Upon the above facts, the judge directed a verdict for the defendant. If the plaintiff was entitled to recover, it was agreed that the damages should be assessed in the sum of $1100, with interest from the date of the writ; otherwise, judgment for the defendant.

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C. A. Welch, for the plaintiff.

A. Russ, for the defendant.

DEVENS, J. It is an elementary principle of the law of contracts, that the minds of the two parties assuming to contract must agree, in case of a sale, as to the subject matter of it. If one agrees to buy and the other to sell a tract of land, the cargo of a particular ship, a horse or other chattel, reference being had by them to different objects or animals, no contract is concluded. *Spurr* v. *Benedict*, 99 Mass. 463. *Kyle* v. *Kavanagh*, 103 Mass. 356. *Harvey* v. *Harris*, 112 Mass. 32. Similarly, where that which is the subject of the sale has at the time no existence, although both buyer and seller are ignorant of this fact, it is held that the proposed contract has nothing to operate upon. *Strickland* v. *Turner*, 7 Exch. 208.

The defendant invokes these principles, and contends that, as there was a mutual mistake and misunderstanding as to the existence of a former insurance, which was a material fact, the agreement is to be treated as void; that it is in effect the same as if the parties had made an agreement expressly conditional upon a supposed state of facts which did not exist. But even if an agreement would not have been made except for the supposed existence of certain facts, it is not treated as void when they are found to be non-existent, unless it has been made dependent upon them, or from its very nature must have been so. If parties deal with each other as to a horse, in the mutual belief that he is sound, the contract is not avoided when he is found otherwise, and this even if it should be proved that, but for this belief, the purchaser would not have bought him. There was no mistake as to the subject of the sale, although there was as to some of its attributes, and the parties had bought and sold that which they intended. If a bar of metal were bought and sold, both parties believing it to be gold, the sale might be avoided if it were not gold, as it would be obvious that a sale of that metal was what was intended. But if there were a sale of a specific vessel, as a vase, both parties believing it to be gold when it was not, or believing it to be the workmanship of some celebrated artist when it was otherwise, the sale could not be avoided, as the vase itself would be the subject which was presented to the minds of the parties. The parties rely

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upon their own information, belief or views, and enter upon the contract taking the risk whether these shall prove correct or otherwise.

In the present case, the subject matter of the transaction, which was the plaintiff's property, was fully understood, as well as the contract of insurance which was made in relation thereto. Even if the parties respectively believed that there was at the time no insurance upon it in the defendant company, there was nothing in the nature of the contract which made its validity dependent on the correctness of this belief. They did not see fit to make a contract of insurance conditional upon this. Such was the case in *Wilson* v. *Queens Ins. Co.* 5 Fed. Rep. 674, which is relied on by the defendant, where the policy as issued was to be void in case of the existence of other insurance not disclosed.

Nor can the defendant resist the payment of the policy upon the ground that it has been induced to make it by reason of a misrepresentation of the plaintiff. The agent of the plaintiff produced a list of the existing insurance on this property, in which the name of the defendant company did not appear, and in this respect the list was incorrect. He stated only his belief that it was correct, which belief was honestly entertained by him, and the defendant had ready and ample means of ascertaining whether there was any error. Had the plaintiff's agent positively asserted the correctness of the list shown by him, it may have been that any further inquiry of the defendant company would have been dispensed with. Even if the means of verifying the statement of the plaintiff were in its power, it would have had a right to rely upon this distinct assertion. But the language used was in effect a declination to assert that there was no other insurance on the property, and an invitation to the defendant to make further inquiries. It was on the part of the agent a refusal to state that there was no other insurance, by limiting himself carefully to the expression of his own belief.

The defendant calls our attention to the facts, that the action is not on the verbal contract, and that the declaration is on the policy of insurance. The policy contains an express warranty that all the facts and circumstances have been truly stated in

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the application for insurance; and it is also made an express condition of the policy, that, "if any material fact or circumstance shall not have been fairly represented, the risk shall cease and determine, and the policy be null and void." There was no written application such as was apparently here contemplated, and expressions of opinion and belief, made in good faith, as to matters material to the risk, are not to be taken as misrepresentations of fact. *National Bank* v. *Insurance Co.* 95 U. S. 673. *Wood* v. *Firemen's Ins. Co.* 126 Mass. 316. Misrepresentation is the statement of something as a fact which is untrue, and which the assured states knowing it to be untrue, or without knowing it to be true, which has a tendency to mislead as to a matter material to the risk. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, 425. If the insurance company is content with expressions of belief, if they are honestly made, it has no right to complain that facts or circumstances have not been fairly represented. Especially must this be so, when the means of correcting any error are in its own power, and it fails to avail itself of them.

Judgment for the plaintiff.

FRANKLIN L. TILESTON & another *vs.* INHABITANTS OF BROOKLINE.

Suffolk. Jan. 29, 30. — March 5, 1883. FIELD & W. ALLEN, JJ., absent.

The St. of 1872, c. 343, gave a town the right to take the waters of a river, and provided that any person, sustaining damage in his property by the taking of lands and water rights, or by the construction of any aqueducts or other works for the purposes of the act, might apply by petition for the assessment of his damages at any time within three years from the taking of said property or construction of said works, and not afterwards; and that no application should be made for such assessment of damages until the water was actually withdrawn or diverted by the town under the authority of the act. *Held*, that a petition, filed more than three years after a withdrawal of the water, by direction of the engineer of the town, acting under authority of the water commissioners, for the purpose of testing the engine, but less than three years before an actual distribution of water to the inhabitants of the town, was filed too late.

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PETITION under the St. of 1872, *c.* 343, for the assessment of damages caused by the taking by the respondent of the waters of Charles River. At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict for the petitioners; and the respondent alleged exceptions. The facts appear in the opinion.

M. Williams & C. A. Williams, for the respondent.

A. Churchill & C. A. Mackintosh, for the petitioners.

DEVENS, J. By the act permitting the town of Brookline to take the waters of Charles River, or other source of water supply, it was provided that any person sustaining damage in his property by the taking of lands, water-rights, &c., or by the construction of any aqueducts or other works for the purposes of the act, if the amount to be paid as damages should not be agreed upon, might apply by petition for an assessment of the same to the Superior Court, "at any time within three years from the taking of the said property or the construction of dams or other works occasioning damages as aforesaid, and not afterwards." St. 1872, *c.* 343. Section 12 of the statute was as follows: "No application shall be made to the court for the assessment of damages for the taking of any water-rights, or for any injury thereto, until the water is actually withdrawn or diverted by said town under the authority of this act."

This petition was brought on May 18, 1878; and, as in actions to enforce a statutory liability the burden is on the plaintiff to prove all the facts which by statutory provisions are necessary to create the liability, it was for the petitioners to show that they had brought the petition within three years from the time when the water was "actually withdrawn or diverted" by the town. *New Bedford* v. *Hingham*, 117 Mass. 445.

It was a controverted question in the case whether there was or was not an actual withdrawal or diversion of the water by the respondent on May 15, 1875, in which case the petition would have been filed too late; and, at the conclusion of the testimony, the respondent asked for a ruling, as matter of law, upon the undisputed facts, that the petitioners had not seasonably filed their petition. It appeared that E. S. Philbrick was the engineer of the respondent town, having charge of the construction of its water-works under direction of its commissioners; that he

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had oral authority from them to start the pumps for the purpose of filling the mains, which he understood to be an official direction; that on May 15, 1875, the pumps were actually started; that the mains were filled with water as far as Clyde Street, the engine pumping for several hours; and that this was done in the presence and by authority of Philbrick. Philbrick testified that the pumps were on that day started by him for the purpose of supplying the town with water; but there was evidence from the manufacturers of the engine and their servants, that, while water was pumped into the mains, the object of the pumping was to ascertain whether the engine performed its functions properly, as its acceptance by the town depended upon this and a subsequent test. There was no evidence of pumping on the 16th, 17th or 18th day of May; nor was there any actual distribution of the water until after the latter date to the inhabitants. If we accept this evidence in the aspect deemed by the petitioners most favorable to themselves, and treat the pumping by which the mains were filled on May 15, 1875, as an act done by the contractors to test the working of the engine, it was done in the presence and with the consent of the engineer of the town, acting by authority of the commissioners; and it is to be determined whether this constitutes an actual withdrawal or diversion by the town, under the authority of the statute.

That it was the intention of the statute to give to the water owner a full and complete statutory remedy for any damages he might sustain by reason of the withdrawal of the water, will not be doubted. It must have been considered that, beside the immediate purpose of distribution, there were certain preliminary purposes incidental thereto which would necessarily precede the actual distribution, such as testing the working capacity of the engine, ascertaining by the use of water whether there were leakages in the pipes, and rinsing and cleansing the mains. A withdrawal of the water for these purposes could not be made without affecting the property of the owners of the water-rights, and must be deemed a withdrawal or diversion under authority of and for the purposes of the statute. Unless this is so, certain acts necessary to be done in the progress of the work of providing the water supply are to be held as tortious, for which the statute provides no remedy and for which the town must be

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responsible in a suit for damages. Had the petitioners brought their petition on May 16, 1875, the respondent could not, we think, have successfully defended upon the ground that the only purpose for which water had been withdrawn was to test the engine or fill and cleanse the mains, and that therefore there was no actual withdrawal or diversion of the water for which the statute remedy existed. The inconvenience of a construction which, under the circumstances supposed, would treat the town or its agents as trespassers, or would deprive the petitioners of a statutory remedy, is obvious, and we find nothing in the language of the statute which requires it.

If pumping the water and filling the mains immediately by its own servants in testing its engine would have been an act which, on the part of the town, would have constituted an actual withdrawal or diversion of the water, it is not the less so when, acting under the authority of its appropriate agents in the execution of the powers conferred, the contractors who construct the engine thus use the water.

We are of opinion that the respondent was entitled to the ruling requested by it, and the instruction as actually given was liable to the serious objection that it might be inferred therefrom that, if water were withdrawn only to test the engine or fill the mains, it would not be such a withdrawal as the statute contemplated, and for which it afforded a remedy.

Exceptions sustained.

LUCY S. PERKINS *vs.* T. H. PERKINS & others.

Suffolk. January 24, 25. — March 6, 1883.

Shares of stock in several corporations were transferred to A. to hold in trust for B., a woman, the certificates being in the name of A. personally. A used the shares as his own, and sold all of them, and, for the purpose of protecting the trust, subsequently purchased other shares to the same amount in the same corporations. While he held the latter shares, B. asked him for the names of her stocks, and A. gave her a list. After a libel for divorce was filed against A., he sold some of the shares, and a few days after purchased the same number in the same corporation. Subsequently, A. transferred all the shares to C., with the undisclosed intent of protecting the trust. *Held*, on a bill in equity by the wife

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of A., against A., B. and C., to reach and apply these shares in satisfaction of an execution for alimony which she had obtained against A., that these facts would warrant a finding that the shares in the hands of C. were impressed with a trust in favor of B.; and that the bill could not be maintained.

BILL IN EQUITY, filed November 15, 1880, under the Gen. Sts. *c.* 113, § 2, *cl.* 11, against T. H. Perkins, Edward W. Mussey and Julia Higgins, to reach and apply, in satisfaction of an execution for alimony held by the plaintiff against the defendant Perkins, her former husband, certain shares of stock, standing in the name of the defendant Mussey, and claimed by the defendant Higgins to be held by Mussey in trust for her benefit. The case was heard by *Devens*, J., and reported for the consideration of the full court, in substance as follows:

There was due from the defendant Perkins to the plaintiff the sum of $11,198.95, being the balance due on an execution against him in her favor, dated November 12, 1880, for alimony in a divorce proceeding begun on January 28, 1880.

In 1870, certain shares of stock in various corporations were set off to Higgins, with other property, in the division of the estates of her brother and sister. At the request of Higgins, the shares of stock were transferred to Perkins, that she might be able to sell them without the consent of her husband, from whom she was separated. Certificates, each of which was numbered, were issued to Perkins in his own name alone. Perkins in fact took the shares in trust for Higgins, but improperly, though without any fraudulent purpose, mixed them with his own shares in the same corporations, and sold them as his own. During the nine years following, he parted with all the shares of stock which he had had from Higgins, and it did not appear what became of them or their proceeds. During the same time he purchased and sold shares of stock, so that, in each of the corporations, he sometimes had certificates in his name for a larger number of shares than he received from Higgins, sometimes for a smaller number, sometimes for the same number, and sometimes for none at all. He never accounted to Higgins for the sales of the shares he received from her, but paid her sums of money equivalent to the dividends declared from time to time by the various corporations on the respective number of shares in each, which he had received from her.

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Prior to December 15, 1879, Perkins had from time to time acquired, by purchase or otherwise, and then held standing in his name, shares of stock in each corporation in amounts corresponding to those he had received from Higgins, and he then held no other shares in any of these corporations.

On December 15, 1879, Higgins asked Perkins for the names of the stocks belonging to her, saying she intended to make her will, and he gave her a paper with merely a list of stocks upon it, which list included those the subject of this action.

On March 2, 1880, he transferred sixteen shares in one of the corporations, and on the 13th of the same month there were transferred to him the same number of shares in the same corporation, which are among those now in controversy.

On May 15, 1880, Perkins transferred the stocks now in controversy to Mussey, and took out new certificates in Mussey's name, without disclosing to him or to any one a purpose to protect Mrs. Higgins or to create a trust, and without making any memorandum to that effect. He testified that he made this transfer "to protect the identity of these shares as belonging to Julia Higgins, and not to connect them with any other part of my property." Mussey transferred the certificates in blank to Perkins, and handed them to him. Subsequently, Perkins gave them back to Mussey, but without disclosing to him or to any one a purpose to protect Higgins or to create a trust. There was no evidence that the shares held by Perkins in December 1879 were purchased with the proceeds of the shares belonging to Higgins which had been sold.

The judge found that Perkins purchased these shares for the purpose of guarding the trust, and intending to set them aside and use them as the trust fund; that the giving of the memorandum of December 15, 1879, was a declaration of such intent; and that, in putting the stocks into the hands of Mussey, he intended to set them apart for the protection of Higgins.

The judge also reported the evidence bearing upon the principal questions in issue. If the facts found and the evidence reported were sufficient to support the conclusion that a trust in favor of Higgins existed as to the shares originally transferred to the defendant Perkins, and attached to the shares

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subsequently transferred to Mussey, a decree was to be entered accordingly; otherwise, a decree to be entered for the plaintiff.

A. S. Wheeler & E. W. Hutchins, for the plaintiff.

W. G. Russell & G. Putnam, for Higgins.

COLBURN, J. We can have no doubt, that the finding of the court, that the shares of stock transferred by direction of Mrs. Higgins to Perkins, in 1870, were held by him in trust for her, was fully sustained by the evidence. This finding we do not understand to be seriously questioned by the plaintiff.

The chief question in the case is whether the shares of stock which stood in the name of Mussey, and were in his possession at the time the bill in this case was brought, were impressed with the same trust in favor of Mrs. Higgins as those originally transferred by her to Perkins. Perkins having wrongfully disposed of the stocks, it was his duty to replace them, and if his breach of trust had been discovered, a court of equity, at the election of the *cestui que trust*, would have required him to replace them. *Ex parte Shakeshaft*, 3 Bro. Ch. 197. *O'Brien* v. *O'Brien*, 1 Molloy, 533. *Oliver* v. *Piatt*, 3 How. 333, 401. Perry on Trusts, § 844. It is true that Mrs. Higgins would not be obliged to accept the substituted stocks, and might have required Perkins to pay her the proceeds of the stocks sold, but if she chose to accept the stocks, no one can object. One share of stock was just as good as any other share; the certificates were not shares, but only the evidence of the ownership of shares, and a certificate of any number of shares had the same value as any other certificate of the same number of shares in the same corporation.

The report finds that Perkins had from time to time, prior to December 15, 1879, acquired, by purchase or otherwise, and then held, standing in his name, as the original shares had stood, the exact number of shares in each of the corporations, then belonging to Mrs. Higgins, and that he then held no other shares in any of these corporations, and that he had acquired these shares for the purpose of guarding the trust, intending to set them aside and use them as the trust fund.

The plaintiff contends, that although the purpose of Perkins was as found by the court, yet that this is not sufficient; that

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there must be some act done transferring the beneficial interest in the shares to the *cestui que trust*, and that there was no such act in this case. Perkins being under a positive obligation to make good the trust property, a less significant act was necessary to transfer the beneficial interest to Mrs. Higgins than might have been required in the case of a mere voluntary declaration of trust.

In *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228, Mr. Justice Wells says: "So if there be an actual trust, and an obligation to make the transfer for the security of that trust, the continued possession of the instrument by the person who executed it, being also its proper custodian for the *cestui que trust*, is consistent with an assignment completed by delivery; and a legal delivery to pass the title will be inferred from very slight evidence."

In *Chace* v. *Chapin*, 130 Mass. 128, Mr. Justice Colt says: "It is enough if the party supposed to be trustee unequivocally declares in writing, or orally if the property be personal, that he holds it upon a well-defined trust. When the trust is thus created, it is effectual to transfer the beneficial interest."

We can have no doubt that the judge was entirely supported by the facts found, and the evidence reported, in his conclusion, that the stocks acquired by Perkins, with the intent to constitute them the trust fund, were, by his so holding them, and the delivery of the list, and the declaration to Mrs. Higgins that he held these stocks for her, impressed with the same trust, in her favor, as those originally transferred to him for her benefit. The transfer of the shares to Mussey, though it might not under the circumstances have much significance as creating a trust, was entirely consistent with the trust, and with a design effectually to distinguish the trust property.

It is urged, that, as after December 1879 Perkins transferred for his own purposes the stock in one of the corporations, and did not acquire the same number of shares in that corporation for eleven days, the newly acquired shares were not impressed with the trust. But we are of opinion that the acquisition of the same number of shares, and placing them with the other

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stocks which were impressed with the trust, and putting the whole into the hands of Mussey, were acts of sufficient significance to impress the newly acquired shares with the same trust as those disposed of. *Decree for the defendant Higgins.*

CHARLES P. HEMENWAY & others *vs.* MARY HEMENWAY & others.

Suffolk. Nov. 19, 1879; Nov. 15, 1881; Jan. 22. — March 7, 1883. FIELD & W. ALLEN, JJ., absent.

A testator bequeathed a residuary fund to trustees, in trust "to hold the said property as they may receive the same, or at their discretion to sell the same or any part or parts thereof," and to invest the proceeds of such sales according to their best judgment, and, whenever they might deem it expedient, to sell any substituted property at any time held on the trusts, and to invest the proceeds according to their best judgment, with power to convert real estate into personal estate and personal estate into real estate, and to prefer a lower interest and gain to a larger one which might involve risk of loss, and, subject to the payment of certain annuities out of the income, "to pay all the remaining net rents and income during the continuance of this trust" to such of four persons, the testator's wife and three children, as might be living at the time of payment, and to the lawful issue of any then deceased child, such issue taking by representation. Twenty years after the death of the survivor of said four persons, the trust property was to be conveyed to the testator's issue then living, they taking by representation according to the stocks. At the testator's death, he left bonds which were worth more than par, and which have since fallen due. Since his death, the trustees had bought other bonds, some at a price slightly above par and some at par and accrued interest. *Held*, as between the life tenants and the remaindermen, that the former were entitled to all the net interest on the bonds received from the testator or bought by the trustees when worth more than par; and that the amount paid for accrued interest on the bonds bought should be retained from the interest subsequently received.

BILL IN EQUITY, by the trustees under the will of Augustus Hemenway, to obtain the instructions of the court as to the construction of the will. Hearing before *Morton*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

The case was argued in November 1879, was reargued in November 1881, and was again reargued in January 1883.

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J. L. Thorndike, for the plaintiffs.

F. E. Parker, for the life tenants.

C. A. Welch, for the remaindermen.

HOLMES, J. The plaintiffs are trustees of a residuary fund bequeathed to them in trust, "to hold the said property as they may receive the same, or at their discretion to sell the same or any part or parts thereof, and to invest the proceeds of such sale or sales according to their best judgment, and so again, and whenever and as often as they may deem it expedient, to sell any substituted property at any time held upon these trusts, ... and to invest the proceeds . . . . according to their best judgment, with power to convert real estate into personal estate, and personal estate into real estate," with injunctions of caution and to prefer a lower interest and gain to a larger one which may involve risk of loss; and, subject to the payment of certain annuities out of the income, "to pay all the remaining net rents and income during the continuance of this trust . . . . to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child, who has then deceased, ... such issue taking by representation." Twenty years after the death of the survivor of the above four, the trust property to be conveyed to the testator's issue then living, they taking by representation according to the stocks.

At the death of the testator, June 16, 1876, he left United States bonds which were worth more than par, and which fell due December 31, 1880, and June 30, 1881. Also bonds of the State of Massachusetts, the city of Boston, and the Chicago, Burlington and Quincy Railroad Company, which in like manner were then worth more than par, and which either have fallen due or will fall due within a comparatively short time.

Since the testator's death, the plaintiffs have bought Union Pacific Railroad Company bonds at a price slightly above par, and Burlington and Missouri Railroad Company bonds at par and what is known in the market as accrued interest. By the usage of the Boston market, these bonds are sold at a certain price, and the accrued interest is then added to make up the full sum to be paid by the purchaser. In New York, they are

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sold "flat," as it is termed; that is, for a price which includes accrued interest.

The short questions which we are asked to determine are: Whether the life tenants are entitled to all the interest, after deducting expenses, on the bonds received from the testator, or bought by the trustees when worth more than par; and also whether the sums paid in respect of accrued interest on the Burlington and Missouri Railroad Company bonds should be retained from the interest subsequently received. The former of these two is of very great and growing importance.

It is said that, when a bond having only a short time to run is purchased at a price above par, inasmuch as it is certain that when it is paid off the trustee will only receive par, the investment is necessarily a wasting one to the extent of the premium paid, and that the rights of the remainderman are sacrificed in favor of the tenant for life, unless a due proportion of the interest is set aside to make good the waste occasioned by the approach of the day of payment. It is pointed out that otherwise the trustees in time might sacrifice the whole fund. The life tenants, while conceding the force of this argument, reply that the court must assume any investments, which it would sanction, to be absolutely safe, and therefore that the only ground of difference in the value of such investments, which the court can recognize, lies in the rate of interest which the investments pay respectively. If that be greater than the market rate, the bond will stand above par; if less, below. And it follows, they say, from the same reasoning which would entitle a remainderman to have the capital protected by a reservation from interest if a short bond is purchased above par, that the tenant for life must have his full interest made good out of the increasing capital if a short bond is purchased below par. If a rule be laid down which will work both ways, the tenants for life seem content. And the remaindermen, of course, desire a determination that the premiums must be made good in all the investments, and a rule broad enough to insure that result on the facts before us.

We incline to agree with the argument for the life tenants, that the only legal reasoning which would warrant throwing the burden of premiums upon interest must start from the

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assumption that the premium is paid in respect of interest, and that, upon that assumption, the life tenants have an equally strong claim upon the increment of capital in the case of short bonds bought below par. But we do not think that the general rule suggested can be laid down with safety for either class of cases. The only conclusive reason which could be offered in its favor would be, that it was shown to aid in doing substantial justice between tenant for life and remainderman. And that, we think, is not made out. In the first place, the proposed rule reposes upon a fiction. It is not true that premiums are paid for interest alone. They are paid for the safety of the capital as well. Probably, much the greater part of them is made up of this and other elements which ought to fall on the remainderman. The court can hardly be asked to close its eyes upon the truth, in order to lay down a rule which can only be justified on the ground that it is actually beneficial. Moreover, as the decisions of this court show that trustees have been exonerated from liability for investments which turned out not to have been safe, there is not even a technical foundation for the postulate.

But we are not only required to start with a fiction. As the next step, we must lay down a fixed and arbitrary rule for what is really in a constant state of fluctuation. For, in order to estimate how much of a given premium is paid for the difference between the interest of the bond and that which the life tenant ought to receive, we have to establish a rate for the latter as our starting-point. This would naturally be the market rate, if that were ascertainable. But there would be no justice in stopping at the rate when the bond was bought merely. If theoretical accuracy were possible, the tenant should receive the current rate of interest at every moment. But the current rate is continually varying from day to day and from month to month, apart from the greater variations to be found by taking a series of years. These variations alone would make actual calculations impossible, but they are a strong objection to establishing a constant rate for the interest of the tenant for life. Unless the court should take upon itself to study the market and to make new orders from time to time, it might well come to pass that the judicial rate should differ more widely than that of the bond from the rate of the market.

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The variations in the rate of interest are not the only ones. The capital itself also varies from day to day for reasons independent of the rate of interest. There is no difference in the rights of the parties, or the duties of trustees, at different moments. These remain substantially the same, for every day that an investment is kept, as they are when it is made. A determination not to sell, if a sale is possible, stands on much the same footing as a purchase. The same reasons that are offered for laying down an absolute rule that compensation shall be made to the capital out of income for a premium paid for bonds, equally require a similar further allowance if the bonds advance, or an offset on the other side of the account if they fall for other reasons than the approach of maturity.

We think, then, that it would be inexpedient and unjust to lay down such a sweeping general principle as is contended for on behalf of the remaindermen, either with or without the complement which would make it satisfactory to the tenants for life. If a universal rule were attainable at all, it would be more easily reached by confining trustees to one or more investments of a kind that would never be paid off, or of which the day of payment was so remote as not practically to affect their value during the continuance of the trust. For then it would matter little or nothing to either party whether the purchase was at a price above or below par. But the precedents in this Commonwealth are against such a course; and the reasons on which the early cases are founded have rather gained than lost in force.

The English cases go the whole length of deciding that, whenever a fund is held upon an authorized permanent investment, the tenant for life receives the entire actual income. Among the investments authorized by statute was East India stock. This yielded a higher rate of interest than the three per cent government stock, and was therefore desired by life tenants; but it was liable to be paid off, and it sold at a premium, and was therefore objected to by remaindermen. When a trust fund was in court, the court would not ordinarily direct an investment in this stock; (*Cockburn* v. *Peel*, 3 DeG., F. & J. 170; *Ungless* v. *Tuff*, 9 W. R. 729; *In re Boyces*, I. R. 1 Eq. 45; *Waite* v. *Littlewood*, 41 L. J. (N. S.) Ch. 636;) unless there were special reasons for favoring the life tenant. *Equitable Reversionary Interest Society*

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v. *Fuller*, 1 J. & H. 379, affirmed July 17, 1861, Lewin on Trusts (7th ed.) 284. *Bishop* v. *Bishop*, 9 W. R. 549. *Cohen* v. *Waley*, 7 Jur. (N. S.) 937. But in *Cockburn* v. *Peel*, Lord Justice Turner was careful to say that the decision was not intended to embarrass trustees in the exercise of the discretion which the statute gave them when the funds were not in court, and that they would be entitled to protection when they acted *bona fide* in the exercise of that discretion. And this statement was affirmed and applied in *Hume* v. *Richardson*, 4 DeG., F. & J. 29, the next year. The latter case then went on to decide that, where trustees, in the exercise of their discretion, retained or made investments in East India stock, the tenant for life was entitled to the whole income arising from such investments. The same conclusion was reached by Lord Cairns in a later case, in which *Hume* v. *Richardson* was not referred to, with regard not only to East India stock, but other securities which the testator had authorized as permanent investments, and which otherwise would have been unauthorized. *Brown* v. *Gellatly*, L. R. 2 Ch. 751. See, further, *Meyer* v. *Simonsen*, 5 DeG. & Sm. 723, 726.

There is another branch of *Brown* v. *Gellatly* similar in principle to *Kinmonth* v. *Brigham*, 5 Allen, 270, which has no bearing on this case. It often happens, of course, that testators leave property of a kind which executors would not be authorized to invest in, such as ships, or a share in a partnership. In such cases, the law allows the executor a proper time for the purpose of disposing of such property. But the fact that time is allowed in order to prevent a sacrifice, does not make the investment an authorized one *ad interim*, in such sense as to entitle the tenant for life to the actual dividends. The conversion would be made at once if it were practicable, and the rights of the parties are not affected by the delays. The fund is treated as if converted, and the tenant for life is allowed a fixed percentage on the amount. *Meyer* v. *Simonsen*, *ubi supra*. *Re Llewellyn's trust*, 29 Beav. 171, 174. Cf. *Dimes* v. *Scott*, 4 Russ. 195, 209. The same thing is true, where a testator allows time for the same purpose. In *Brown* v. *Gellatly*, the testator had left ships, etc., and had authorized his executors to sail them until they could be satisfactorily sold, which he left to the discretion of his executors. As it was evident that this was only done with the

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intent to have the ships converted cautiously and in proper time, it was held that the tenant for life was not entitled to the actual profits of the ships, but to four per cent on a valuation as at the death of the testator, and no more. The ships were not made an authorized permanent investment by reason of the fact that a long time was allowed to dispose of them.

Our refusal to lay down a general rule does not put the capital in danger of being exhausted. The trustee, who has the fund always in his hands and under his eyes, must take reasonable care to hold the balance even between opposing interests. The answer to the extreme cases supposed on behalf of the remaindermen is, that, if they were conceivable where the trustee was acting in good faith, they would be inconsistent with that reasonable discretion which he must exercise at his peril. This responsibility is what trustees are paid for assuming, and we have no reason to suppose that it has proved too great to be borne. We think that the course most advantageous to all parties concerned is for us to confine ourselves to dealing with each case that may come before us on its particular circumstances, and to allow trustees all the freedom that is consistent with caution and fairness.

Coming, then, to the particulars in the present case, we think the trustees were authorized to retain the testator's bonds mentioned in the bill until they were paid off. By the residuary clause they are "to hold the said property as they may receive the same, or at their discretion to sell the same." The power thus given to hold the property as they may receive it, is not an extension of the time for conversion, but authority to continue an investment as such, and the whole net income of investments thus authorized must go to the tenants for life by the terms of the will. *Brown* v. *Gellatly*, *ubi supra*. *Bulkeley* v. *Stephens*, 10 L. T. (N. S.) 225. *Green* v. *Britten*, 1 DeG., J. & S. 649.

With regard to the bonds of the Union Pacific Railroad Company purchased in 1878, and then having nearly eighteen years to run, the fact that a small premium was paid is not, of itself alone, enough to prevent the tenants for life from receiving the net interest, and the circumstances, so far as disclosed, show no special reason why they should not receive it. The investment

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constitutes a very small proportion of a large estate. Nothing shows that the premium was paid for interest above the market rate. We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties; and the relation between the remaindermen and the life tenants is such that there is less call than there might be in some other cases for treating the life tenants with great strictness.

Lastly, as to sums paid in respect of accrued interest. It is true that there are strong decisions of Vice-Chancellor Kindersley to the effect that no allowance is to be made for them except under very special circumstances. *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173, 182. *Freman* v. *Whitbread*, L. R. 1 Eq. 266. See also *Bostock* v. *Blakeney*, 2 Bro. C. C. 653; Lewin on Trusts (7th ed.) 297. But the reason offered, that it would lead to burdensome and expensive investigations, does not seem to us to apply here. By the Boston usage, the sum paid for accrued interest is always expressly stated, and we see no reason why it should not be repaid from interest subsequently received. It has been in some cases in England. *Londesborough* v. *Somerville*, 19 Beav. 295. *Bulkeley* v. *Stephens*, 3 N. R. 105, 107; *S. C.* 10 L. T. (N. S.) 225, 229. *Decree accordingly.*

ABBY R. LORING & others *vs.* GEORGE BRODIE & another.
SAME *vs.* SAME.

Suffolk. Nov. 17, 1881; March 20, 1882. — March 12, 1883. COLBURN & HOLMES, JJ., absent.

If a cashier of a bank receives securities on a loan from the bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities.

If a promissory note to a bank is signed by the maker, as trustee, and a portion of the securities deposited as collateral therefor is clearly marked as trust property, it must be inferred that the other securities, consisting of bonds capable of manual delivery, are also trust property.

A power in a trustee to sell trust property, and change investments, gives him no authority to pledge the property.

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If a bank receives as collateral security for a loan bonds capable of manual delivery, and is affected by the knowledge of its then cashier that the bonds are trust property, it continues to be affected by such knowledge, so long as the transaction continues, although its form is changed by new notes given in renewal, from time to time, after the cashier had ceased to be connected with the bank.

If a bank makes a loan on certificates of stocks, which show on their face that they belong to a trust estate, the bank is affected with knowledge of this fact, whether the certificates are read by the officers of the bank or not.

If bonds are unlawfully pledged to a bank by a trustee, and the bank, with knowledge of this, sells them, it is liable for the value of the bonds, together with interest from the time of the sale, and such interest as it may have received on them before the sale.

An indenture of trust, executed in this State, gave the trustee power to manage and improve the trust estate, and receive the income and profits from time to time, and also to sell or exchange the whole or any part of the trust estate, and the proceeds to invest in any other real or personal estate. The trustee applied to a bank here for an advance on cotton to be shipped from a distant State, proposing to forward to the bank drafts on the consignee of the cotton, and, to further protect the bank, offered to pledge personal securities belonging to the trust estate. He also falsely represented that the cotton was grown on plantations belonging to the trust. The bank, without further inquiry, accepted the proposal, and took the securities, knowing that they formed part of the trust estate. *Held*, that the bank was liable for the value of the securities to the trust estate.

If a cashier of a bank is also acting as agent of a person, an account rendered by him as agent to his principal of moneys deposited in the bank and drawn out by him, as agent, is not admissible as primary evidence as against the bank.

If a bank, in which a trustee has an account, permits him to overdraw his account, and to pay the overdraft with the proceeds of trust property, which he had a right to sell, the bank is not responsible to the trust estate, if the money overdrawn is misused by the trustee, in the absence of evidence that the money was overdrawn under such circumstances that the bank was fairly put upon inquiry, whether the money was to be used for other purposes than those of the trust.

DEVENS, J. These are two bills in equity against George Brodie and the Merchants' National Bank. They proceed against the defendant Brodie for breach of two different indentures of trust, and against the defendant bank as the recipient, with equitable notice of the existence of the trust, of certain portions of each trust estate, as collateral security for, or in payment of, debts due the bank from Brodie individually. These funds consisted of stocks and United States bonds, and also of cash, the proceeds of certain real property belonging to the second estate, sold by Brodie and paid to the bank.

The first bill seeks a conveyance from the defendant bank of six shares of the York Manufacturing Company, ten shares of

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the Essex Manufacturing Company and ten shares of the Fitchburg Railroad Company, alleged to have been held in trust for the plaintiffs, under an indenture of December 25, 1849.

The second bill seeks a conveyance from the defendant bank of eighty shares of the Fitchburg Railroad Company, twenty shares of the Essex Manufacturing Company and fifteen United States bonds of $1000 each, and also the restitution of certain moneys, being the proceeds of sales of real estate, which stocks, bonds, and real estate are alleged to have been held in trust for the plaintiffs, under an indenture of December 12, 1865.

Brodie has been defaulted, and, the bills against him being taken *pro confesso*, his liability for the misappropriation of the bonds, stocks and moneys is established.

The issue, so far as the responsibility of the bank is concerned, naturally divides itself into three inquiries: 1st, as to the United States bonds which were a portion of the trust property; 2d, as to the stocks; 3d, as to the moneys received from sales of real estate. Although there are two distinct trusts, it will not apparently be difficult to separate the property belonging to each, so as to render the appropriate decree in each case.

All the transactions as to the United States bonds terminated in a note, signed by Brodie as trustee, for the sum of $15,000, dated November 21, 1874, for which it was agreed between Brodie and the bank that the bonds should be held as security, and to the payment of which they were subsequently appropriated by the bank. It is to be considered whether they came into the possession of the bank under such circumstances as informed the bank, or fairly placed it on inquiry, as to whether it was dealing with trust property without proper regard to the rights of the beneficiaries. There were no United States bonds included in the first, or earlier trust; they formed a portion of the second. In order to ascertain the liability of the bank, it is necessary to examine the history of previous transactions as to the bonds, so far as it is disclosed by the evidence.

On December 20, 1865, J. K. Fuller was, and for a long time had been, the cashier of the defendant bank. He was appointed attorney by Brodie to collect the dividends on the stocks held by him as trustee, and a list was appended to the power, enumerating eighty shares of the Fitchburg Railroad Company, twenty

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shares of the Essex Manufacturing Company, two shares of the Old Colony Railroad Company, and fifteen bonds of the United States for $1000 each. Fuller receipted to Brodie for the bonds for safe keeping, signing the receipt as cashier; and, throughout the transactions that took place, he acted, or assumed to act, for both Brodie and the bank.

A letter was written on April 27, 1867, by Fuller to Brodie, that the bank would make him a loan, but would require him to send a note as trustee specifying the bonds as security. This may fairly be deemed an official communication, on behalf of the bank, of the terms on which it would deal with him. Shortly after, a loan was made to him of $6000. All the notes were not given in evidence which are referred to in the accounts of the bank, but apparently from that time, during the cashiership of Fuller, Brodie as trustee was always indebted to the bank for loans secured by pledge of these bonds, as well as of other of the trust funds. Several notes were put in evidence from Brodie to the bank, in which the security was specified "as a deposit of United States bonds," and one note specifies the security as a deposit of United States bonds then on deposit in the bank. Of these notes the most important is that of September 13, 1869, for which the collateral security specified was "15 bonds of 1000 each, and 90 shares of Fitchburg R. R."

Fuller left the bank on February 1, 1873. It is the contention of the defendant bank that, whatever the character of the transactions with Fuller, they were terminated; and that it was by a distinct transaction, which occurred after one Chapman became cashier, that these bonds became collateral security for the note, for payment of which, or for that of the note which was substituted therefor, they were eventually sold.

Before determining this fact, it will be well to inquire what the legal position of the parties to these notes was while Fuller was cashier. The plaintiffs contend that this note of September 13, 1869, was still in existence when Chapman became cashier, and was the foundation of the note of November 21, 1874, given subsequently to Chapman's incumbency of the office, upon which the bonds were sold. If these bonds could not have been devoted by the bank to the payment of the note of September 13, 1869, on account of any notice under which the bank

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received them, it is not of importance that the form of the note for which they were held as security was changed before this sale was made.

That Fuller knew that these bonds were trust property is quite clear. The schedules which were given him when he became the attorney of Brodie, and took them into his possession, specified them by numbers. He was distinctly referred to the trust deeds for the enumeration of these as well as the other property of the trust. As cashier, he had asked for a pledge of these bonds in reply to an application for a loan by Brodie. The notes of Brodie were signed by him as trustee, which afforded evidence that the bonds were trust property, especially as stocks which showed upon their face that they were trust property were united with them as collateral security. By law, the bank is entitled to exercise, by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking. The cashier of a bank is its executive financial officer. It is under his direction that its moneys are received and paid out, that its debts are collected and paid, that its securities are kept and transferred. Such powers as are habitually exercised by cashiers must be held, so far as the public is concerned, to have been conferred upon Fuller by his election to the office. *Merchants' Bank* v. *State Bank*, 10 Wall. 604. Whether he was or was not entitled, by authority of the bank, to make loans or discounts, or whether these were actually made by him, is not expressly shown; but, in any event, he was the officer to receive information and conduct the negotiation in regard to them with the bank, to pay out its moneys and receive the securities therefor. If he received the securities with a knowledge that they were wrongfully transferred, and were the property of others, his knowledge must affect the bank. His attitude and relation were such that it was his duty to communicate this information to the bank; and it cannot be deemed that he was a mere channel of transmission, and that his knowledge is to be treated as affecting only himself. Although he was the attorney of Brodie in taking care of and managing the trust property, he was the cashier also, and there was a confidence reposed in him as such which makes his knowledge the knowledge of the bank.

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Even if it be true that, when an agent, in collusion with his principal, is engaged in a transaction, the effect of which would be to obtain from another, for whom he is also acting, money by false pretences, it will be presumed conclusively that he made no communication of the facts, (which is asserted in *Cave* v. *Cave*, 15 Ch. D. 639,) this will not enable the bank to escape responsibility. So far as the conduct of all parties to the transaction is shown, it does not seem that they supposed they were engaged in a wrongful transaction. They apparently thought that they might properly do what they continued to do, and repeatedly did. But if it be treated as if they knew that they were acting wrongfully, where the rights of third persons are concerned, the loss by such transactions must fall on that principal who has enabled his agent to commit the fraud. If Fuller was the instrument of Brodie in committing a fraud on the bank, by unlawfully transferring to it the securities of another, whether he concealed this fact or not, the bank could not take the securities from his hands, or hold them in its custody, except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, its cashier. Thus, in *New Milford National Bank* v. *New Milford*, 36 Conn. 93, the same person being town treasurer and cashier of the bank, executed as treasurer a note to the bank, fraudulently and without authority, and applied the money thus obtained to his own use. It was held that his fraud as treasurer was known to him as cashier, that by that knowledge the bank was bound, and that there could be no recovery on the note against the town.

But whether the bank would or would not be bound by this knowledge of the cashier, enough is shown, before the retirement of Fuller, to have given notice to its directors that Brodie was dealing with trust funds, and assuming the right to pledge them, and that the United States bonds were such funds. They thus were bound to ascertain his rights in this regard. They cannot deny a knowledge of the terms of the notes which they discounted, and of the securities pledged for them. Notes were signed by Brodie as trustee in several instances, secured by United States bonds, which were discounted before September 13, 1869, and the note then given was secured by ninety shares of

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the Fitchburg Railroad Company, held by Brodie as trustee, as well as by $15,000 in United States bonds. This is the first note apparently for which any of the stocks were used as security. Even if we should admit the proposition of the defendant bank, that the mere fact that a trustee gives, as collateral security, bonds which have no means of identification does not notify the bank that they are trust property, yet such is not this case, for the stock was obviously trust property. When a note is signed by one as trustee, and a portion of the collateral security is clearly marked as trust property, it must be inferred that the rest, consisting of bonds capable of manual delivery, is also such.

It is to be noticed, also, that, before the retirement of Fuller, the other stocks sought to be recovered in these suits had all been transferred to the bank as collateral security, (although it does not appear clearly in connection with which notes they were thus first used,) and that they all distinctly appeared to be trust property.

In any aspect, the evidence appears to us to show that the bank had sufficient notice that the bonds, as well as stocks, were trust funds; and that Brodie as trustee was assuming to pledge them; and thus it was the bank's duty to ascertain whether he had a right so to do. *Shaw* v. *Spencer*, 100 Mass. 382. *Hayward* v. *Cain*, 110 Mass. 273. Had inquiry been made, and had an examination of the indentures taken place, they would have shown no authority to pledge the bonds or stocks, even if Brodie was undertaking thus to benefit the trust. Such authority could not be derived from the power to sell the property and change the investments, which is there found. *Wood* v. *Goodridge*, 6 Cush. 117. *Haldenby* v. *Spofforth*, 1 Beav. 390. *Page* v. *Cooper*, 16 Beav. 396. *Russell* v. *Russell*, 36 N. Y. 581. 2 Perry on Trusts, § 768, and cases cited.

The bank contends that, whatever the relation of Fuller to it, and whatever responsibility it might be under had the notes taken while he was cashier resulted in the sale of these bonds, such transactions were entirely concluded before Fuller's retirement; that the loans, for which the bonds were security, made when Chapman was cashier, had no relation thereto; that Chapman had no knowledge that the bonds were those of a trust estate; and that the bank cannot be affected by a knowledge

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which it had in a former transaction, or with which it might be affected in a former transaction by the knowledge of its then cashier. Chapman became cashier on July 1, 1873. He testifies that there was at that time but one note signed by Brodie as trustee, which was of the date of December 19, 1872, and was secured by six shares of the York Manufacturing Company, thirty shares of the Essex Manufacturing Company, and ninety shares of the Fitchburg Railroad Company. According to his statement, this note was paid as follows: February 7, 1873, $1000; March 18, 1873, $2000; and the balance on September 18, 1873, by a new note of $12,000, secured by $12,000 of United States bonds. He also testifies that, on October 1, 1873, $1000 was lent to Brodie, and a $1000 United States bond taken as collateral security; and that, on November 11, 1873, $2000 was lent and $2000 of United States bonds taken as collateral security. All of these notes, on November 21, 1873, were combined into one note for $15,000, and all the bonds held as collateral to it. This note of December 19, 1872, is not produced. The note of September 13, 1869, is produced, with its indorsements. This note was for $20,000, and was secured by ninety shares of the Fitchburg Railroad Company, and $15,000 of United States bonds. By an indorsement, it appears that $5000 was paid upon this note on July 23, 1872. There was therefore $15,000 due on it when Chapman became cashier. The indorsements upon it, made in the handwriting of the discount clerk, show that the identical payments which Chapman testifies to as having been made on the note of December 19, 1872, were in fact made upon this note. Those two payments being made, the note was reduced to $12,000, and this must therefore have been the sum included in the note of September 18, 1873, and not the balance due on a note of December 19, 1872. It is not shown that any of the bonds by which the note of $20,000 was secured had been given up, and the inference is inevitable that these bonds came into the hands of Chapman as security for that note, upon which a balance of $15,000, without computing interest, was due when Chapman became cashier. For the note of September 18, 1873, $15,000 of United States bonds were left as security, and we deem it proved that the note of September 18, 1873, was for the balance due on the note of

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September 13, 1869, for $20,000, secured by stocks and bonds. The effect of this transaction was simply to leave all the bonds which had been held as collateral security for the balance of the note of $20,000 now liable for the note of September 18, 1873. Two subsequent loans were made, which were afterwards incorporated with the note of September 18, 1873, and thus made the note of November 21, 1874, but no additional bonds appear to have been delivered to the bank. The note of October 1, 1873, is for the sum of $2000, and contains the words "have left as collateral security therefor U. S. bonds;" that of November 11, 1873, does not purport to be secured by bonds. That these three notes constituted that of November 21, 1874, is stated by Chapman, and for this the security given is $15,000 of United States bonds. The same security is therefore held for the note of November 21, 1874, that was held for the note of September 18, 1873, and which had previously been held as a part of the collateral security for the note of September 13, 1869. It must be inferred that these bonds are the same, when the only object of the note of September 18, 1873, was to apply the bonds alone as security for a note which should represent the balance then due on the $20,000 note of September 13, 1869, and thus release the other security in the way of stocks; and the only apparent object of the note of November 21, 1874, was to include in one note, and thus secure by the same collateral security, the sum represented by the note of September 18, 1873, and the two subsequent loans respectively of $1000 and $2000.

Whether there was or was not in the bank when Chapman became cashier a note of December 19, 1872, secured by stocks, the transactions as to these bonds were but a continuation of the original transaction of September 13, 1869, as to bonds, and we are satisfied that Chapman is in error, when, in his testimony, he treats the United States bonds as for the first time, during his conduct of affairs, deposited in the bank as security for the note of September 18, 1873. The evidence which comes from the notes and the indorsements must control his statement, and compels us to consider his recollection of the matter at fault.

Such being the case, the contention of the defendant bank that, if it is held liable, it must be on the ground that "at some earlier period of time, while Fuller was cashier, the bank had

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taken United States bonds as collateral for loans to Brodie as trustee, and that Fuller was cognizant at the time that these bonds were the property of the trust, that Fuller's knowledge is the knowledge of the bank, and that this knowledge will by law affect the bank in all its future transactions with Brodie as trustee, in which he pledged bonds of a similar character, although Fuller had ceased to be its cashier," presents an inquiry that does not here arise. Upon the facts as we find them, the bank received these bonds charged with the knowledge that they were trust property, and with the knowledge that they were not used for the legitimate purposes of the trust, or rather with the duty of ascertaining whether they were so used. They were never restored to the trustee, and no new and distinct transaction ever took place. The form of the note was changed as the amount originally due on it was diminished, and other securities were released as the bonds became a sufficient security for the balance due, which was expressed by the new note of September 18, 1873, for which, when further advances had been made, the note of November 21, 1874, was substituted, upon which the bonds were sold. Whatever may be the law as to subsequent and distinct transactions, and how far the bank is to be affected by knowledge acquired in or duties arising from previous transactions, is not here important. While the same transaction continues, however its form may change, the knowledge or the duty which existed at the time of its inception is still attached to it. It must be held, therefore, that the bank knew that the bonds belonged to a trust, and it was a duty that it should inquire whether there was any authority to pledge them, which inquiry would have revealed the misuse made of them by Brodie.

If we accept Chapman's statement as correct, the result would not be different. According to that, when he came into the bank there was a note of December 19, 1872, for the sum of $15,000, secured by the stocks in dispute. All these stocks showed distinctly, by the certificates or the transfers, that they were the property of these trust estates. Whether Chapman read them or not, the bank must have imputed to it the knowledge which they bore upon their face. It was known, therefore, that they constituted trust property pledged for a note of the trustee. When therefore these were released, and a new note was given on

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September 18, 1873, by the trustee, with United States bonds as collateral security for the amount then due on the note of December 19, 1872, Chapman and the bank were fairly put on their inquiry whether the bonds were not trust property also. This inquiry was never made, and we cannot infer that it would have been useless.

We are therefore of opinion that the bank is responsible to the plaintiff in the suit upon the trust created in 1865 for the amount for which these bonds were sold by the bank, together with interest from the time of sale and such interest as it may have received thereon previous to such sale.

The next question concerns the responsibility of the bank for the shares of stock, part of which belong to each of the trusts which the two bills seek severally to protect or enforce. The stocks belonging to the respective trusts were not kept separately in the certificates by Brodie, but an examination of the indenture under the first trust shows that it included ten shares of the Essex Manufacturing Company, ten of the Fitchburg Railroad Company and six of the York Manufacturing Company, while that of the second trust included eighty shares of the Fitchburg Railroad Company and twenty of the Essex Manufacturing Company. The certificate of thirty shares of the Essex Manufacturing Company, which was held by "George Brodie, trustee of the estate of Christian W. R. Loring," which was transferred to the Essex Manufacturing Company, included the shares belonging to each estate, while the certificate for ninety shares of the Fitchburg Railroad Company to George Brodie, trustee, included the ten shares belonging to the first trust with the eighty shares belonging to the second.

We have already stated our reasons for finding that, when Fuller left the bank, there remained the note of September 18, 1869, secured by $15,000 of United States bonds and ninety shares of the Fitchburg Railroad Company. Whether there was also, as stated by Chapman, a note of December 1872 secured by ninety shares of the Fitchburg Railroad Company, thirty of the Essex Manufacturing Company and six of the York Manufacturing Company, there is no doubt that the giving of the note for $12,000 on September 18, 1873, for which $15,000 of United States bonds were held as collateral security, operated to release

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the stocks theretofore held as collateral, so that Brodie was entitled to them. Whether they were actually delivered to Brodie is not perhaps important; they either came back to the bank, or it was allowed to retain them by reason of a contract, substantially contemporaneous, entered into with Chapman with the concurrence of the president of the bank, and described by him substantially as follows: Brodie, as trustee, applied to the bank for an advance upon cotton to be shipped from Arkansas, to secure which he proposed to forward to the bank drafts on the consignees of the cotton, as shipped, and, to protect the bank from ultimate loss by reason of the drafts to be made by him in anticipation of shipments, offered to pledge as security the shares in question, together with two additional shares of the Essex Manufacturing Company. He accompanied his proposal by a statement that the cotton to be shipped "was raised on plantations belonging to his trusts; that he had usually sent the cotton to New Orleans, but, on inquiry among manufacturers here, he found that he could do better for his trusts by sending it here." "He proposed to make the drafts and do the whole business in the name of George Brodie & Son." George Brodie & Son "were a banking-house at Little Rock, and he could," as he stated, "negotiate his drafts on better terms through a banking-house than doing it directly." The account was to be kept on the books of the Merchants' Bank in the name of George Brodie & Son, who were to draw on the bank, as from time to time they might need; but, as drafts or acceptances might not be paid, or drafts not accepted, and the account might be overdrawn, he proposed to give the bank as security the York, Essex and Fitchburg stock, "the same as we," the bank, "had had before," with two additional shares of Essex stock. Brodie said he had a right to pledge these stocks for a debt of George Brodie & Son, that the cotton and all the transactions were for the benefit of the trusts, and that the cotton all belonged to the trusts. The proposal made to the cashier was assented to by the president of the bank, and the transaction began.

That there was no plantation or cotton belonging to the trusts is not now disputed. It was a speculation entered upon by the trustee in collusion with Brodie & Son, if in truth Brodie & Son are different persons from Brodie. The overdrafts of Brodie &

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Son had amounted in November 1873 in all to $10,000, and three notes, amounting together to that sum, each note secured by ninety shares of the Fitchburg Railroad Company and six of the York Manufacturing Company, had been given therefor by George Brodie & Son. On May 1, 1874, the overdrafts had amounted in addition to $12,909.59, for which a note was given "secured by a deposit of shares in the York Manufacturing Company, the Fitchburg Railroad Company and the Essex Manufacturing Company, and United States bonds." This note was signed by George Brodie & Son. About $4000 having been paid on these notes on or before November 21, 1874, on that day, for the balance due, $18,603, George Brodie, trustee, gave his note, purporting to be secured by ninety shares of the Fitchburg Railroad Company, six shares of the York Manufacturing Company and thirty-two shares of the Essex Manufacturing Company, which securities were then in the possession of the bank. George Brodie, trustee, on September 9, 1869, had transferred to the bank ninety shares of the Fitchburg Railroad Company, as security for the indebtedness of George Brodie, trustee, to the bank. On November 25, 1874, the bank transferred to Brodie, trustee, these ninety shares, this being done by Brodie as attorney for the bank, and Brodie, trustee, then transferred them absolutely to the bank. While the certificate of the Essex Company stock to George Brodie as trustee of C. W. R. Loring had been in the bank as collateral security, as shown by the evidence of the recitals in the notes and the statement of Chapman, the actual transfer to the bank, which was absolute, was not made until November 24, 1874, and the handwriting of the body of the transfer is that of Chapman. A signature in blank was on the back of it, of Brodie, trustee. This certificate was in the name of Brodie, trustee of the estate of Christian W. R. Loring. No new assignment, in connection with the note of November 21, 1874, was made of the stock in the York Manufacturing Company. The certificate of this was in the name of Brodie as trustee of the estate of C. W. R. Loring, and it had been assigned to the bank, in some previous transactions, as collateral security, on April 5, 1870.

That, at the time when the agreement as to the proposed cotton enterprise began, and also when the note of November 21, 1874, for $18,603, was given, the bank knew that the stocks in

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question were trust property, is not disputed. It is equally clear that the estate to which the property belonged was well known. The certificates afforded ample evidence of this. The bank had full notice that it was dealing with a trustee who was pledging trust funds to carry on cotton operations, conducted in the name of another party, whose overdrafts were to be made good by a pledge of trust funds. It made no investigation as to whether the trust was in writing, or what the provisions were that permitted a transaction in regard to trust property, which was so unusual that it was calculated to induce careful examination. No inquiry was ever made of any one interested in this estate, nor of any of the beneficiaries, some of whom must have been known at the bank, as payments were made to them by the cashier. The bank was contented with the simple statement of Brodie, that this cotton came from the trust property, and that he was carrying on all these cotton transactions for the benefit of his trust; and no details of the business were asked or given. It is said, that, even if the instrument of trust had been examined, it would not have shown that the plantation from which Brodie pretended that the cotton came was not the property of the trust. The indentures would certainly have shown that no such property as a cotton plantation was embraced in them, and that the only real estate conveyed thereby was in the vicinity of the city of Boston.

It is also said that, as there was a power to sell and reinvest the trust property, a cotton plantation in Alabama might have been bought, and therefore it would not have been known but that there was such property. To this there are two answers: First, that, if it appeared that there had been such a change in investments as to make the trustee, as such, the owner of a cotton plantation in a remote State, which could not be conducted but by advances of money, ample evidence would have been afforded that the trustee was dealing with the funds of the estate in a manner not contemplated by the indenture. A power to manage and improve an estate, and to change investments, cannot be interpreted as authorizing the trustee to enter into hazardous and speculative enterprises, and, in order to do this, to raise money by pledge of other investments. No authority existed to embark in enterprises for the sake of making money

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for the trust by incurring the hazards of business. Each indenture gives the trustee power to "manage and improve said trust estate, and receive the income and profits thereof from time to time." It also gives him the power, "whenever he may deem it expedient or proper, to sell or exchange the whole or any part of the trust estate, and the proceeds to invest in any other real or personal estate." Although the word "profits" is used in the power first given in connection with the word "income," it is used in the sense of "proceeds," and it would be a forced construction which should infer from it so extraordinary a power as that of embarking in such enterprises. No one who read the instrument of trust could have believed that it conferred such authority.

In the second place, had inquiry been fully and fairly made, the fact that there was no cotton plantation would almost necessarily have been developed. No deeds to the trustee could have been exhibited, and equally it would have been impossible for him to have traced the sale or exchange by which he had become, on behalf of the trust, the owner of such an estate. Notice of the existence of an instrument of trust affects the party purchasing trust property with full notice of its contents, whether he chooses to examine it or not. This is conceded. He should be thus affected, not only by what appears upon the face of such an instrument in terms, but by the information given by it, if such information, when made the subject of fair and reasonable examination, would show the conduct of the trustee to be such as it did not permit. The inquiry made of the trustee was of the most perfunctory character. His proposal, in itself suspicious, was accepted upon an improbable statement, which there was no attempt to investigate, when investigation might have developed its falsity, and when a knowledge of the estate and of some of its beneficiaries afforded the means of a proper investigation. When inquiries are never made, and the instrument of trust not examined in connection with them, it is not to be assumed that they would or could have been answered by replies, which, although false, would have been clear, consistent, and such as would have baffled an intelligent scrutiny. Were we to hold the bank to be exonerated from neglect in this matter, and to have performed its whole duty, it would be to say

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that trust property might be disposed of by pledge at any time, if the party taking the security had the assurance of the trustee that he had the right to convey it. The plaintiffs are therefore entitled to the ninety shares of the Fitchburg Railroad Company, six shares of the York Manufacturing Company and thirty shares of the Essex Manufacturing Company, by decrees which shall oblige the defendant bank to return to each trust its appropriate portion, with the dividends received thereon.

The next claim is for the restitution of certain moneys, the proceeds of real estate sold by the trustee Brodie, which were received by Fuller, by him paid into the bank, and by it, as the plaintiffs aver, devoted to the payment of private debts due from the trustee; and this upon the ground that, although Fuller was the agent of Brodie, yet he was at the same time the cashier of the bank, and that it is therefore chargeable with notice of the fact, known to him, that the funds were trust property. So far as this position relates to the knowledge of the bank, it appears to us correct. If the act of Fuller was merely to pay the money to the receiving teller, another agent of the bank, he himself was the general financial agent, in whose custody and under whose general supervision all its funds were kept. His knowledge was not merely such as it was his duty to communicate, and which therefore it must be held that he did communicate, but it was itself the knowledge of the bank. The bank could not receive funds except charged with the knowledge which the cashier had, and subject to the responsibilities which that involved.

The proofs offered show three several sums thus paid to Fuller, which were by him paid into the bank, which were trust property, namely, the proceeds of three estates held under the second indenture; the first paid in by S. B. Allen on August 7, 1871, amounting to $9000; the second, the amount received by the discharge of a mortgage on August 17, 1871, of $3028; and the third, the amount received from the sale of a certain other estate on December 13, 1871, of $8048.33.

This being shown, it is of course necessary to be proved that these sums, or a definite portion of them, were devoted to liquidating the private indebtedness which Brodie owed the bank. To prove this, the plaintiffs do not offer the books of the bank,

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but certain accounts rendered by Fuller to Brodie, which he states are the same as the books of the bank. Their reception was objected to; and, so far as establishing a liability of the bank is concerned, these accounts do not seem to us to have been admissible. In rendering them, Fuller was certainly not acting as cashier of the bank, but as the agent of Brodie. The books of the bank were in existence, and should have been produced. There was no occasion for secondary evidence of their contents. These accounts were not used to refresh the memory of the witness as to the state of the transactions with the bank. He had no recollection of the transactions derived from the accounts to which he testified.

It is not important, however, to pursue this matter, as even if the accounts rendered by Fuller to Brodie, which he says were transcripts, be accepted as the bank accounts, we are of opinion that the plaintiffs fail to prove thereby what is necessary for their case. There was no account between the bank and Brodie except with Brodie as trustee. Upon this account, these sums are credited, while a portion of the amounts debited to him are for payments, as shown by the names of the beneficiaries, for the purposes of the trust. It appears thereby that advances were sometimes made to Brodie as trustee. Such are the demand loans stated in the account, to the payment of which the trust funds, such as those derived from the sale of the real estate as above stated, were to some extent, apparently, applied. These loans, as described by Fuller, do not appear on the bank books. Memoranda or checks in such cases were made, which were held as cash, but no notes were discounted. These demand loans are in effect permissions to the depositor to overdraw, and if the trust funds, when paid in, are absorbed by these overdrafts, the demand loan is thus paid. We are not prepared to say, that permitting a trustee to overdraw, and then to pay the overdraft by the proceeds of trust property which he has a right to sell, necessarily makes the bank responsible for the money thus overdrawn, if it be misused by the trustee. Had the trustee sold the real estate, which he had authority to do, and deposited the proceeds with the bank, there being no balance against him, and had he then drawn out the money and devoted it to his own use, the bank would certainly not be responsible.

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It is not shown, in regard to the bank account, that any advances were made to Brodie, trustee, under such circumstances that the bank was fairly put upon inquiry whether they were or were not to be used for other purposes than those of the trust, and thus that it should be made responsible for the fraud committed by him on the estate.

In these respects the transaction differs from those as to the bonds and the stocks, which were carried on by means of the pledge of securities, no authority to pledge which was given to the trustee. An authority to pledge securities cannot be inferred from an authority to sell the same and reinvest the proceeds. The transaction as to the bonds commenced by a proposition on the part of the trustee for a private loan, which was met by a counter proposition that these bonds should be used as collateral security, and which was continued by the pledge of bonds which the trustee had no right to use for such purpose, and which it must be inferred that the bank knew, or should have known, he had no right so to use. The transaction as to the stocks, not only put the bank upon inquiry as to whether the trustee had any right to pledge the stocks of the trust under any circumstances, but especially whether he had any right to conduct the business he assumed to carry on thereby, which inquiry was never properly made.

Decrees for plaintiffs accordingly.

The case was argued at the bar in November 1881, and reargued in March 1882.

E. D. Sohier, for the plaintiffs.

S. Bartlett & F. Bartlett, for the Merchants' Bank, cited *Jones* v. *Smith*, 1 Hare, 43, 56, and 1 Phil. 244, 253; *Le Neve* v. *Le Neve*, 1 Ambl. 436; *Ware* v. *Egmont*, 4 DeG., M. & G. 460; *Wyllie* v. *Pollen*, 32 L. J. (N. S.) Ch. 782; 2 White & Tudor Lead. Cas. in Eq. (4 Am. ed.) 177, 178; *Cave* v. *Cave*, 15 Ch. D. 639; *Kennedy* v. *Green*, 3 Myl. & K. 699; *Sharpe* v. *Foy*, L. R. 4 Ch. 35, 40; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Calais Steamboat Co.* v. *Van Pelt*, 2 Black, 372, 377; *Mussey* v. *Beecher*, 3 Cush. 511, 516; *Ashton* v. *Atlantic Bank*, 3 Allen, 217; *New York & New Haven Railroad* v. *Schuyler*, 34 N. Y. 30, 68.

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WILLIE I. COLE *vs.* CHARLES J. GROVES & another.

Suffolk. March 9. — 12, 1883. DEVENS & W. ALLEN, JJ., absent.

Section 1 of the Gen. Sts. *c.* 85, so far as it authorizes a third person to recover treble the value of money lost by gaming, is a penal statute; and by the Gen. Sts. *c.* 155, § 20, an action by such third person is barred, if not brought within one year after the date of the loss.

The answer to a declaration, under the Gen. Sts. *c.* 85, § 1, in three counts, averred that "the cause of action, the alleged offence mentioned in the plaintiff's declaration, was not committed within one year before the suing out of the plaintiff's writ, wherefore he cannot maintain his said action." *Held*, that, even if the declaration set out more than one cause of action, the statute of limitations, Gen. Sts. *c.* 155, § 20, was properly pleaded.

TORT. Writ dated September 19, 1881. The declaration contained three counts. The first count alleged that, on or about August 7, 1880, one Henry G. Cole played at cards in a certain building in Boston, and lost by said playing at cards the sum of $1060, and paid to the defendants said sum; that said Cole neglected to, and did not, within three months after said loss, without covin or collusion, prosecute the defendants with effect for said money lost as aforesaid; and that the plaintiff was entitled to recover treble the value of the money so lost. The second and third counts were similar, except that they respectively alleged that the defendants were the owners, and the tenants and occupants, of the building where the money was so lost. The answer contained a general denial, and also the following: "And the defendants further answering say that the cause of action, the alleged offence mentioned in the plaintiff's declaration, was not committed within one year before the suing out of the plaintiff's writ, wherefore he cannot maintain his said action."

Trial in the Superior Court, before *Mason*, J., who allowed a bill of exceptions, which, after stating that the pleadings formed part thereof, was, in substance, as follows:

The plaintiff introduced evidence to show that, on August 6 and 7, 1880, Henry G. Cole lost to the defendants, by playing at cards, the sum of $1060.41. After the plaintiff had introduced his testimony, and all evidence in the case had been put in, the defendants requested the judge to rule that the action could not be maintained, because it was not begun within one

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year after the date of the loss of said money, as required by the Gen. Sts. *c.* 155, § 20. The judge refused so to rule. The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

A. Russ, for the defendants.

H. E. Swasey & G. R. Swasey, for the plaintiff.

COLBURN, J. We have no doubt that § 1 of the Gen. Sts. *c.* 85, (Pub. Sts. *c.* 99, § 1,) under which this action is brought, so far as it authorizes a third person to recover three times the sum of money or value of goods lost by gaming, is a penal statute; or that the Gen. Sts. *c.* 155, § 20, (Pub. Sts. *c.* 197, § 4,) apply to this action. *Read* v. *Stewart*, 129 Mass. 407. *Cumberland & Oxford Canal* v. *Hitchings*, 57 Maine, 146. A right of action is given to the loser to recover the money or value of the goods lost, but his right of action is limited to three months, and is remedial. After the expiration of that time, all right of action in the loser is gone, and a right of action accrues to any third person who may choose to sue for the penalty; but this action must be brought within one year next after the offence is committed, which, in this case, was the winning and receiving the money. *Plummer* v. *Gray*, 8 Gray, 243. *Barnicoat* v. *Folling*, 3 Gray, 134. We are of opinion that the statute of limitations was properly pleaded to all the causes of action, if there was more than one set out in the plaintiff's declaration.

We do not understand from the bill of exceptions that there was any contest that the money was lost on August 6 and 7, 1880, or that there was any evidence which could have warranted the jury in finding that the loss occurred at any other time; and, as the action was not brought until September 19, 1881, we think the jury should have been instructed that the action could not be maintained. *Exceptions sustained.*

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DAVID W. LEGALLEE *vs.* MARK A. BLAISDELL.

Suffolk. March 9.— 12, 1883. DEVENS & W. ALLEN, JJ., absent.

To maintain an action for a malicious arrest, authorized by the certificate of a magistrate issued under the St. of 1877, *c.* 250, § 5, the burden is on the plaintiff to prove that, at the time the defendant procured the arrest, he had no probable cause to believe that the plaintiff intended to leave the State; and it is not enough to prove that the plaintiff did not in fact intend to leave the State.

TORT for a malicious arrest of the plaintiff by the defendant, on an execution issued out of the Municipal Court of Boston, in favor of the defendant, as administrator of the estate of one Jones deceased. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows:

It was admitted that the defendant, as administrator, recovered judgment against the plaintiff, on April 13, 1880, for the sum of $139.51 as debt or damage, and $10.51 as costs of suit; and that execution was issued thereon for the above amounts on March 7, 1881.

A master in chancery for Suffolk county testified that the defendant applied to him for a certificate authorizing the arrest of the plaintiff on March 8, 1881, under the St. of 1877, *c.* 250, § 5, and made the affidavit required by said section, and the witness granted his request and authorized the arrest of the plaintiff by a certificate. On cross-examination, he testified that the defendant first applied for the notice required by § 1 of said chapter, which was duly issued and taken away by the defendant; and that afterwards, on the same day, it was returned without having been served. It was also admitted that the plaintiff was arrested on said execution, on said March 8, by a constable of the city of Boston qualified to make such arrest.

A commissioner of insolvency for the county of Suffolk testified that he, at the request of the plaintiff, issued a notice of the plaintiff's desire to take the oath that he did not intend to leave the State, on or about March 21, 1881, returnable the next day at 9 A. M.; that both parties appeared, and, after eight or ten hearings, he found, on May 12 following, that the plaintiff,

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at the time of the arrest and at the time of his examination, did not intend to leave the State; and that he thereupon discharged him from arrest and made the proper certificate of the same.

The plaintiff offered further evidence tending to prove, and the defendant admitted that it proved, that the plaintiff, at the time the affidavit was made and the certificate authorizing the arrest of the plaintiff was obtained, did not intend to leave the State.

The defendant offered no evidence; and asked the judge to rule that, upon the evidence offered by the plaintiff, the action could not be maintained. The judge so ruled, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

S. W. Harmon, for the plaintiff.

M. A. Blaisdell, pro se.

MORTON, C. J. This is an action of tort for a malicious arrest. To maintain the action, the burden is on the plaintiff to prove that, at the time the defendant procured the arrest, he had no probable cause to believe that the plaintiff intended to leave the State. It is not enough to prove that he did not in fact intend to leave the State. All the evidence in this case is consistent with the theory that the defendant honestly believed, and had good reason to believe, that the plaintiff did intend to leave the State. The plaintiff therefore did not sustain the burden of proof, and prove his case; and the Superior Court rightly directed a verdict for the defendant.

Exceptions overruled.

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FRANKLIN K. PHILLIPS *vs.* BROWNELL GRANGER & another.

Suffolk. March 26. — 27, 1883. FIELD & DEVENS, JJ., absent.

In an action of contract, on a promissory note, the defendant filed an answer in recoupment, for a larger amount than the note. At the trial in the Superior Court, the evidence tended to show that the defendant's damages were less than the note. The jury returned a verdict for the defendant, which the court set aside of its own motion. The defendant then moved that a verdict be entered for the plaintiff for the difference between the amount of the note and the damages which the evidence showed that the defendant had sustained. The court overruled the motion; and the defendant alleged exceptions. *Held*, that the exceptions must be overruled, with double costs.

CONTRACT on a promissory note for $400. The defendants in their answer sought to recoup damages occasioned by the alleged conversion, by the holder of the note at the time of its maturity, of a certificate of stock which the defendants had deposited with the holder of the note as collateral security for the payment of the same at maturity, claiming that said damages amounted to $552.

At the trial in the Superior Court, before *Gardner*, J., the evidence tended to show that the defendants' damages for the alleged conversion could not have been more than $368. The jury returned a verdict for the defendants, which the court immediately set aside of its own motion. Thereupon the defendants moved that they be allowed to remit the difference between the amount of the note and the amount of the defendants' damages, to wit, $32, with verdict for the plaintiff. The plaintiff would not consent to this. The judge refused the motion; and the defendants alleged exceptions.

S. Butler, for the defendants.

D. F. Fitz, for the plaintiff, moved for double costs.

BY THE COURT. It was within the discretion of the Superior Court to set aside the verdict rendered for the defendants. The court had no power to change the verdict for the defendants into a verdict for the plaintiff, even before it was set aside. After it was set aside, it certainly had no power to order a verdict to be entered for the plaintiff.

The motion of the defendants was rightly denied.

Exceptions overruled, with double costs.

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HENRY LEMON *vs.* CITY OF NEWTON.

Middlesex. Nov. 20, 1882. — March 1, 1883. DEVENS & HOLMES, JJ., absent.

A town has no authority by statute, in this Commonwealth, to lay out and construct drains or sewers.

A town is not responsible for damages resulting from work done under the supposed authority of illegal and void votes.

TORT for an alleged nuisance to the plaintiff's estate. At the trial in this court, before *Devens*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

C. Robinson, Jr. & G. A. Blaney, for the defendant.

B. F. Butler, for the plaintiff.

COLBURN, J. The following facts appeared in evidence in this case. A legal town meeting of the inhabitants of Newton was held on November 13, 1871. The 16th article in the warrant for said meeting was as follows: "To see if the town will change, or authorize the change, of the course of the brook running between Church and Elmwood Streets in the village of Newton, across land recently purchased by Grace Church Parish and land of others, stone up and cover the same according to plans of an engineer, or do anything relating thereto." Under this article, it was voted, "That the matter of a change in the brook or drain crossing Church Street near Grace Church lands, and extending from Mount Ida to Charles River, also of making the stream a common drain for the town of Newton, be referred to the selectmen, with instructions to construct the said drain." It was also voted "to appropriate the sum of $2500 to be expended by the selectmen, if necessary, under article 16."

At a legal town meeting of said inhabitants, held March 4, 1872, the warrant contained the following articles: "Article 33. To see if the town will vote to lay out a drain from the foot of Mount Ida to the Charles River, through the brook or natural drainage, or otherwise, and appropriate money therefor. Article 34. To see if the town will authorize the selectmen to lower the drain or culvert under the Boston and Albany Railroad at Brook Street, Newton Corner, and arrange, if need be,

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to have Brook and Washington Streets lowered so as to go under the railroad." Acting under article 33, it was voted "that the town build said drain." Acting under article 34, it was voted "that this article be divided, and that the first part of it, respecting a drain, be referred to the selectmen;" and "to refer the latter part of the article, lowering the streets, to the selectmen to report at a future meeting." At an adjournment of this meeting, held on March 11, 1872, acting under article 33, it was voted "to appropriate ten thousand dollars for said drain."

At a legal meeting of said inhabitants, held May 27, 1872, the 5th article in the warrant was as follows: "To see if the town will make an additional appropriation of money for drainage at Newton Corner;" and, acting under this article, it was voted "to appropriate five thousand dollars for drainage at Newton Corner."

At a legal meeting of said inhabitants, held March 3, 1873, the 28th article was as follows: "To see if the town will construct water-ways for fire purposes on the line of the new drain in Newton Village, and appropriate seven hundred dollars for the same." At an adjournment of this meeting, held March 10, 1873, it was voted "that this article be referred to the selectmen, with full powers, and that a sum not exceeding $700 be appropriated therefor."

The brook in question was a natural watercourse, which ran through the most populous portion of Newton, and over the plaintiff's land into Charles River. Acting in pursuance of the votes above stated, the selectmen of the town, beginning about three hundred feet above the plaintiff's land, and extending the work about twenty-eight hundred feet up the brook, deepened and changed in places the channel of the brook, under the streets and through the lands of individuals, walled up its sides with rough stones not laid in mortar, and covered it over with large flat stones, and put soil thereon, leaving openings through catch-basins to receive the surface water of the streets, with other openings, fitted with iron covers for fire purposes, and to afford means of entering the brook. The bottom of the brook or drain, so constructed, was the natural soil, was flat, with uniform sectional grades, and was from four to two and a half feet in width, and the walls were from five to three feet in height

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inside, the work gradually diminishing in width and height from the lower to the upper end.

This work was begun early in 1872, and was completed on May 20, 1873. The town of Newton became a city on January 5, 1874. Before the work was done by the town, private persons had, for a long time, by means of private drains, or otherwise, discharged house filth and sewage from privies and sinks into said brook. How much this had increased or diminished since the work was done, was in controversy. There was no evidence that the defendant had by vote, or by any of its officers or agents, given any license to any person to enter any private drain into said brook or drain; and there was no evidence of any drainage from any land or building owned or occupied by the town. Repairs had been made on the drain, and the expenses paid from the treasury of the defendant.

The plaintiff contended, and introduced evidence tending to show, that, as a consequence of this work, the brook through his land had been rendered filthy; that his premises had been rendered unhealthy by stenches coming from the brook; that the volume of water had been increased; and that large quantities of filthy matter had been deposited on his lands; that though the work was done without any proper proceedings under any statute, yet as it was done pursuant to votes of the town, and by its agents, and paid for by the town, the defendant was liable for such damages as the plaintiff had sustained; and this action of tort was brought to recover therefor.

The defendant, denying that the plaintiff had sustained any damage in consequence of anything done by the town or its agents, contended that the votes passed by the town were not authorized by law, and of no effect to bind the town; and that the defendant was not responsible for any consequences that resulted from the work done by the agents of the town pursuant to said votes.

The first question presented for our determination is the validity of the votes of the town. Acts have been passed from time to time, commencing at an early period, relating to drains and sewers. Prov. St. 1709–10 (8 Anne) *c.* 5; 1 Prov. Laws (State ed.) 643. Prov. St. 1753–4 (27 Geo. II.) *c.* 43; 3 Prov. Laws (State ed.) 738. Prov. St. 1762–3 (3 Geo. III.) *c.* 27;

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4 Prov. Laws (State ed.) 620. St. 1796, *c.* 47. Rev. Sts. *c.* 27. But all these acts relate to drains and sewers constructed by private persons, and give the selectmen of towns certain authority to regulate and adjust the claims of persons interested, and to protect the public streets from injury by the construction of such drains and sewers therein.

The St. of 1841, *c.* 115, authorized the selectmen of towns, and the mayor and aldermen of cities, to make, maintain and repair all main drains and common sewers in their respective towns and cities; made all main drains and common sewers which had theretofore or might thereafter be constructed by any town or city the property of the town or city; and provided for an assessment of expenses upon persons benefited. This act, as well as its revision in the Gen. Sts. *c.* 48, was only in force in such cities or towns as might adopt it.

The St. of 1869, *c.* 111, extended the provisions of the Gen. Sts. *c.* 48, to all cities and towns, authorized the taking of land, and provided for the assessment of damages, as in cases of laying out highways and town ways. This act was in force at the time the votes were passed and the work done in this case. No general statute has been passed authorizing towns in their corporate capacity to lay out or construct drains or sewers. In acting under the St. of 1869, *c.* 111, selectmen do not act as agents of the town, but as public officers, deriving their power from the sovereign authority. *Child* v. *Boston*, 4 Allen, 41. *Brimmer* v. *Boston*, 102 Mass. 19.

The town having no authority by statute to lay out and construct drains or sewers, and such authority not being necessarily incident to the exercise of its corporate rights and the performance of its duties, and ample provision having been made for their laying out and construction by the selectmen, we are of opinion that the votes of the town, except perhaps that of March 10, 1873, which is unimportant in this case, were illegal and void. *Stetson* v. *Kempton*, 13 Mass. 272. *Parsons* v. *Goshen*, 11 Pick. 396. *Vincent* v. *Nantucket*, 12 Cush. 103. *Hood* v. *Lynn*, 1 Allen, 103.

The next question presented is, whether the defendant is liable in tort for damages resulting to the plaintiff from the work done by the selectmen. We are of opinion that a town cannot

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be held responsible for damages resulting from work done under the supposed authority of illegal and void votes. *Anthony* v. *Adams*, 1 Met. 284. *Cushing* v. *Bedford*, 125 Mass. 526.

Exceptions sustained.

METHEAS FLECK *vs.* UNION RAILWAY COMPANY.

Middlesex. Jan. 30. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

A passenger in a street car, after signalling to the conductor to stop the car, left his seat and stood for a moment, while the car was in motion, on the rear platform, upon which there was an accumulation of snow and ice, rendering the platform slippery, expecting that the car would stop so that he could alight, and omitted to take hold of the rail. The car jolted, and he was thrown off. *Held*, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received, was a question of fact for the jury, and not of law for the court.

TORT for personal injuries occasioned to the plaintiff by being thrown from a horse-car belonging to the defendant. Answer, a general denial. Trial in the Superior Court, before *Bacon*, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff testified, that, on December 27, 1880, it snowed in the forenoon, but stopped snowing at about noon; that about half-past ten o'clock in the evening of that day he got into a car belonging to the defendant, in Harvard Square, to ride to Dover Street in North Cambridge; that this car had four horses attached to it on account of there being snow on the ground; that the car was an ordinary close car, with a door and platform on each end and seats on each side running the entire length of the inside; that he sat on the right-hand seat at the end nearest the driver; that, when the car got within about one hundred and fifty feet of Dover Street, he got up and nodded his head to the conductor to stop the car; that the conductor was standing on the rear platform, opposite the doorway (the door being wide open), leaning against the dasher; that the plaintiff walked slowly to the rear end of the car and stepped on to the platform and stood a moment, expecting that the conductor would stop

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the car when it got to Dover Street; that the car jolted and made a little jounce, and his feet slipped, and he was thrown off the car head first, receiving the injuries complained of; that the platform had ice and snow upon it, which was slippery and not very level; that it was on account of this ice and snow, and of its being slippery and not very level, that he fell. On cross-examination, the plaintiff testified that he saw snow and ice on the platform, and that it was slippery when he got into the car, but he did not take particular notice, and did not slip when he went in; that he did not have hold of anything, as he supposed that the car would stop and that he was not going to stand there very long; and that he had ridden in the defendant's cars for about fifteen years, and never had an accident before.

At the close of the plaintiff's testimony, the judge directed a verdict for the defendant. If the facts, as testified to by the plaintiff, showed, as a matter of law, such want of due care that he was not entitled to recover, the verdict was to stand; otherwise, the verdict to be set aside and a new trial granted.

G. A. Perkins, for the plaintiff.

W. H. Martin, for the defendant.

C. ALLEN, J. There was some evidence tending to show carelessness on the part of the plaintiff, but, under all the circumstances stated, it was not so palpable as to preclude him from a right to have it passed upon by the jury. Standing on the rear platform of a street car in motion, when there is room inside, is not conclusive. The existence of snow and ice upon the platform is not necessarily such an element of danger as to be conclusive proof of negligence on the part of one who, with knowledge, undertakes to stand there for a moment or two, in expectation of the car's stopping to let him get off. Omitting to take hold of the rail will not of itself, as matter of law, prevent a recovery. Nor do these facts when combined show a case where common experience and the general sense of all prudent persons at once stamp the act as one of carelessness and reckless disregard of personal safety. The case does not fall within *Wills* v. *Lynn & Boston Railroad*, 129 Mass. 351, and other cases, where it could properly be held that, as matter of law, the plaintiff did not sustain the burden of proving that he was in the exercise of due care; but rather within the class of cases of

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which *Treat* v. *Boston & Lowell Railroad*, 131 Mass. 371, may be taken as an example. No question is presented as to whether there was any sufficient evidence of negligence on the part of the defendant. The case had not reached a proper stage for a ruling on that point. *New trial granted.*

ANNA D. GUERNSEY & another *vs.* JOHN T. WILSON.

Suffolk. Jan. 26. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

A mortgagor of land remained in occupation thereof after the mortgage had been foreclosed, to his knowledge; and, without the consent of the owner, erected a house and barn thereon, which rested on posts sunk into the ground, earth being banked up above the sills of the house, and the space between the barn and the ground being boarded up, the upper boards being nailed to the barn and the posts. The barn projected over other land of the mortgagor, and the entrance to it was from his land. Both house and barn could be removed without doing any great injury to the land. *Held*, that both house and barn became part of the realty; and that the owner of the land could maintain a bill in equity to restrain the mortgagor from removing them.

BILL IN EQUITY, filed March 28, 1881, by Anna D. Guernsey and her husband, for an injunction to restrain the defendant from removing certain buildings from a parcel of land in Winchester. Hearing before *Field*, J., who reported for the consideration of the full court the following case:

The land described in the bill was the property of the first-named plaintiff, who acquired the same from the receivers of the Mercantile Institution for Savings. The defendant, who previously owned the land, mortgaged it to one Judkins, who assigned the mortgage to the Mercantile Institution for Savings. The receivers thereof foreclosed the mortgage for breach of the conditions, and after the foreclosure had become complete, and after knowledge thereof on the part of the defendant, he without the consent, express or implied, of the receivers, in the fall of 1880, built upon the land a wooden house, fitted and intended for a dwelling, to be used in connection with the land. The house was thirteen feet by twenty-four feet, and rested upon posts sunk into the ground, with the earth banked up above the sills of the house

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on all sides thereof. The defendant, in the fall of 1879, also built on the land a wooden barn twenty-five feet by thirty-six feet, the main entrance to which was upon land belonging to his wife, the barn extending into the land of the defendant's wife not more than eighteen inches at any point. It rested on posts sunk into the ground, with the space between the barn and the ground boarded up, the upper boards being nailed to the posts and to the sills of the barn, and the earth being banked up on three sides around the barn. Both house and barn were built after the foreclosure became complete, and after the defendant knew this; but he had continued in occupation of the land, it being vacant, without either the consent or the express prohibition of the owners of the land. The defendant thought that he might perhaps at some time buy the land, and his immediate intention was to use the house for a farmer to occupy, who should be employed on this land and the adjoining land of his wife, and the barn was intended to be used in connection with both lots of land. The house and barn could be removed without doing any great injury to the land, or to the vines, trees and shrubs upon it. The plaintiffs were neighbors of the defendant, and knew that he erected the house and barn, but did not know the state of the title or his relations to the land when he erected the same, and the first-named plaintiff bought the land without that knowledge. After the foreclosure and the conveyance of the land, the defendant made daily use of the barn, although notified by the plaintiffs to desist from passing upon the land; and, before this bill was brought, the defendant threatened and was preparing to remove the house and barn from the land, and claimed the right to do so.

On these facts, the judge entered a decree for the plaintiffs, from which the defendant appealed. Such decree was to be entered as justice might require.

A. D. Bosson, for the plaintiffs.

J. T. Wilson, pro se.

HOLMES, J. The defendant in this case was the former owner of certain land subject to a mortgage. The mortgage was foreclosed with his knowledge. He remained in occupation of the land, and, without any contract or consent on the part of the owner, put up a house and part of a barn upon it. The female

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plaintiff then bought the land, and now seeks to enjoin the defendant from removing the structures.

When the buildings were attached to the realty, they became part of it, and the defendant does not bring himself within the rules that authorize a severance, even as against the owners at that time. *Sudbury Parish* v. *Jones*, 8 Cush. 184, 190. *Oakman* v. *Dorchester Ins. Co.* 98 Mass. 57. *Madigan* v. *McCarthy*, 108 Mass. 376, 377. The plaintiff seems to have the additional circumstance in her favor, that she is a purchaser without notice. *Gibbs* v. *Estey*, 15 Gray, 587. *Madigan* v. *McCarthy*, *ubi supra*. At all events, she has a perfect title; and no reason is disclosed why equity should not protect her from irreparable damage.

Decree for the plaintiffs.

MARY MCCABE *vs.* CITY OF CAMBRIDGE.

Middlesex. Jan. 30. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

A notice to a city, under the St. of 1877, c. 234, § 3, that a person has been injured by a defect in a highway, if delivered, in the city clerk's office, to the assistant clerk in the absence of the clerk, is duly served on the city.

A notice to a city stated that a person had been injured by reason of a defective sidewalk, "while walking on the right hand side of C. Avenue" in that city, "and coming towards the crossing of the F. Railroad;" that the defect was "a depression in the sidewalk caused by the sinking of the earth placed over a large plank gutter;" and that it "was located about one third of the way from the said railroad crossing to Walnut Street in said" city. It appeared in evidence, at the trial of an action against the city for such injury, that there was only one sidewalk on C. Avenue, and that was on the right hand side going from said city towards the railroad crossing; that the defect was caused by the rotting out of a large plank gutter; and that there was no street in the vicinity of the accident of the name of "Walnut," but that there was a street called "Walden," which entered C. Avenue near by. *Held*, that the notice was sufficient, under the St. of 1877, c. 234, § 3.

TORT for personal injuries occasioned to the plaintiff, on October 1, 1880, by a defect in a highway in the defendant city. At the trial in the Superior Court, before *Bacon*, J., there was evidence tending to prove the following facts:

On October 30, 1880, the son of the plaintiff obtained the notice hereinafter set forth, got it signed by his mother, who

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was confined to her bed, and at about two o'clock in the afternoon, by her authority, left it, in the absence of the city clerk, with the assistant city clerk, at the clerk's office in Cambridge, the assistant clerk saying that it was just as well to leave it with him, and that the clerk would not return that day. The assistant clerk was appointed under an ordinance of the city, in pursuance of the St. of 1869, *c.* 72; and it was his custom, in the absence of the clerk, to receive all papers and notices, and to hand them to the clerk as soon as he returned. The notice was handed to the mayor and aldermen on November 3, 1880, and notice was afterwards issued to the plaintiff for a hearing, before the committee on claims, upon the question of damages. A copy of the ordinance is printed in the margin.*

The judge ruled, against the objection of the defendant, that, upon the above evidence, the jury might find that the notice had been legally served. The plaintiff then put in evidence the following notice, addressed to the defendant, dated September 30, 1880, and signed by the plaintiff:

"Please take notice that on the first day of September, A. D. 1880, the undersigned, Mary McCabe of Cambridge, in the county of Middlesex, while walking with due care, in the evening, on the right-hand side of Concord Avenue in said Cambridge, and coming towards the crossing of the Fitchburg Railroad (crossing said avenue) called the Fresh Pond Crossing, she met with an accident by reason of a defective sidewalk, injuring her ankle, and receiving internal injuries. The defect consisted of a depression in the sidewalk caused by the sinking of the

* "Section 1. Annually in the month of March there shall be elected by the city council in joint convention, an assistant city clerk, who shall be sworn to the faithful discharge of his duties, shall hold office for one year or until his successor is chosen, shall be removable at the pleasure of the city council, and shall receive such compensation as the city council shall prescribe.

"Section 2. The assistant city clerk shall assist the city clerk in recording, indexing, and certifying mortgages of personal property and assignments of wages, and shall also, if necessary, attest documents as provided in the second section of chapter seventy-two of the Acts of the year eighteen hundred and sixty-nine, and shall perform all other duties pertaining to the office of city clerk when thereto requested by the city clerk or when from any cause the office of city clerk shall be vacant."

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earth placed over a large plank gutter put in by the city, made to turn surface water from the street, the plank gutter having rotted out and leaving a great depression in the sidewalk, into which she stepped and fell. Said defective spot had existed more than twenty-four hours before the accident, and was located about one third of the way from the said railroad crossing to Walnut Street in said Cambridge. I hereby give the city of Cambridge notice of its defective street and sidewalk, and of its location, and of the accident which befell me and the day it happened. And I hereby give the city further notice that I intend to prosecute a suit against the city of Cambridge for the injuries sustained by reason of said defect, and hereby claim as damages the sum of four thousand dollars."

Concord Avenue, on which the accident happened, is at least half a mile long. The defect consisted of a hole, caused by the rotting of a plank gutter, about twelve inches square, put in by the city to carry off water under the sidewalk to the land below the street. This portion of the street passed through a piece of low ground, and the street was raised up by filling above the natural level. There was but one sidewalk on this portion of the avenue for a long distance, and this was a gravelled walk about six or seven feet wide, on the right-hand side of the avenue going towards Fresh Pond Crossing. There were within a certain distance in this sidewalk three similar spouts, put in by the city to carry off the surplus water, made of plank, and about a foot square. The hole into which the plaintiff stepped and fell was about thirteen by fourteen inches, and of about thirteen inches in depth. North of the defect, the Fitchburg Railroad crossed this avenue, called and known as the Fresh Pond Crossing. South of the crossing were the three wooden spouts or culverts above named, the centre spout or culvert being the defective one; the spout or culvert nearest the crossing was four hundred and seventy-seven feet south of the crossing, the second or defective one was eight hundred and seventy-nine feet south of the crossing, and the third spout or culvert was one thousand one hundred and twenty-two and one half feet south of the crossing. Soon after the reception of the notice, the defect was repaired by the city. There was no street near the place of the accident by the name of Walnut Street; but there

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was a street called Walden Street, near by, which entered Concord Avenue.

The judge ruled that the notice was insufficient; directed a verdict for the defendant; and reported the case for the determination of this court. If the ruling as to the service of the notice was right, and the ruling as to the sufficiency of the notice was wrong, the verdict was to be set aside, and a new trial granted; otherwise, judgment to be entered on the verdict.

A. R. Brown, for the plaintiff.

J. W. Hammond, for the defendant.

HOLMES, J. The notice in this case was well served on the city of Cambridge when it was put into the hands of the assistant clerk in the city clerk's office. The fact of leaving his assistant in charge of the office was a sufficient request to receive official communications properly to be delivered at that place, within the ordinance under which the assistant was appointed. And, on general principles, the assistant was so far the servant of the clerk and all one with him that a delivery to the assistant, under the circumstances, was a delivery to the clerk.

We also think that the notice was sufficient. It states that the plaintiff was injured by reason of a defective sidewalk, "while walking on the right-hand side of Concord Avenue in Cambridge and coming towards the crossing of the Fitchburg Railroad." As there was only one sidewalk on Concord Avenue, and as this was on the right-hand side going from Cambridge toward the railroad crossing, the notice necessarily imported that the plaintiff was walking from Cambridge toward the crossing, and that the defect was on the Cambridge or southerly side of the crossing. The defect, which was caused by the rotting out of a large plank gutter, was accurately described, and was of such a nature as to be easily identified. The defendant would hardly ask us to presume that there were several such defects in the neighborhood. Then follows the statement that the defective spot "was located about one third of the way from the said railroad crossing to Walnut Street in said Cambridge." There was no street of that name thereabouts. But the statement is controlled by the rest of that notice, which shows that the defect was on Concord Avenue,

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and the notice as a whole indicates clearly enough that the place of the accident was near the crossing. Thus we have the three facts of a peculiar and easily identified defect, the street and the side of the street upon which it was, and its proximity to a fixed point. Under these circumstances, as there was a street called Walden Street, which entered Concord Avenue hard by, the reference to Walnut Street rather helps than harms. It is not quite *idem sonans*, but it suggests its own explanation, and made it easier rather than more difficult to apply the notice to the land. *New trial ordered.*

WILLIAM H. MURPHY & another *vs.* EDWIN MANNING.

Middlesex. Feb. 1. — March 3, 1883. FIELD & W. ALLEN, JJ., absent.

An action upon a judgment recovered in this State against a resident thereof, on a debt due to a resident of another State, is not barred by a discharge in insolvency granted here on proceedings begun after the judgment was rendered, if the original debt would not have been discharged.

HOLMES, J. This is a suit on a Massachusetts judgment. The defence is a discharge in insolvency granted in this State on proceedings begun after the judgment was rendered. The plaintiffs were New Jersey creditors of the defendant, (a resident of Massachusetts,) and it is not denied that the original debt would not have been discharged. *Ilsley* v. *Merriam*, 7 Cush. 242. *Kelley* v. *Drury*, 9 Allen, 27. But the distinction is taken, that, as the plaintiffs in this case have elected to merge their debt in a Massachusetts judgment, that judgment at all events must be subject to the state laws, and is disposed of by the discharge. A very forcible argument may be made in favor of such a view, but we think that there are stronger considerations on the other side, which is also supported by the weight of authority.

Kelley v. *Drury* establishes that our insolvent laws do not shut out parties whose claims are not subject to or discharged by them from access to our state courts. We may say more

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broadly that the Legislature has not shown an intention to adopt a local rule as to the procedure within its control, except so far as it has power to dispose of the substantive rights in aid of which the procedure is set in motion. We are speaking, of course, of the statutes affecting the present decision. It follows that, unless the original debt is merged in the judgment in such a sense that the debt, and not merely this form of it, has become subject to Massachusetts law, we must attribute the same validity to the judgment that remains to the debt. We think that the debt is not affected in this respect by the judgment. A judgment does not obliterate the essential features of the obligation on which it is rendered. *Betts* v. *Bagley*, 12 Pick. 572, 580. For instance, when, by reason of the insolvent laws, execution upon a former judgment could have issued only against the estate, and not against the body, of the defendant, execution upon a second judgment recovered upon the first was limited in the same way. *Choteau* v. *Richardson*, 12 Allen, 365. So, the antecedent equities of a surety continue unchanged by a joint judgment against him and his principal; and conduct on the part of the creditor which would have discharged him before will discharge him afterwards. *Carpenter* v. *King*, 9 Met. 511, 516. Conversely, here, the plaintiffs' claim before judgment, not being subject to discharge by our laws, did not lose that characteristic and become more infirm by the change, upon any ground of the substantive law.

We think that the weight of authority is in favor of our conclusion, notwithstanding the dicta in *Ogden* v. *Saunders*, 12 Wheat. 213, 363, 364, and *Towne* v. *Smith*, 1 Woodb. & M. 115, 123. See *Watson* v. *Bourne*, 10 Mass. 337; *Whitney* v. *Whiting*, 35 N. H. 457; *Poe* v. *Duck*, 5 Md. 1. See also *Brown* v. *Bridge*, 106 Mass. 563, where the implication is, that, if the plaintiff had not been domiciled in Massachusetts when he recovered the judgment sued upon, it would not have been discharged by the subsequent discharge in insolvency.

This court having deferred to the authority of *Baldwin* v. *Hale*, 1 Wall. 223, in *Kelley* v. *Drury*, *ubi supra*, it is proper to add that the reasoning of that case applies to the one before us with almost, if not quite, the same force as to *Kelley* v. *Drury*. The debt is still due to citizens of another State, who remain as

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independent of its jurisdiction and as inaccessible to notice of its proceedings as ever. They were no more bound to resort to Massachusetts in order to get the fruits of their judgment after it was recovered, than they were to go there in the first instance to collect their debt. *Judgment for the plaintiffs.*

A. G. Lamson, for the defendant, cited *Hempstead* v. *Reed*, 6 Conn. 480; *Anderson* v. *Wheeler*, 25 Conn. 603; *Waterman* v. *Curtis*, 30 Conn. 135; *Percy* v. *Foote*, 36 Conn. 102; *Felch* v. *Bugbee*, 48 Maine, 9; *Whitney* v. *Whiting*, 35 N. H. 457, 462; *Goodsell* v. *Benson*, 13 R. I. 225; *Stoddard* v. *Harrington*, 100 Mass. 87.

E. B. Callender & J. F. Shea, for the plaintiffs.

City of Newton *vs.* Charles Devlin & others.

Middlesex. Jan. 9. — March 6, 1883. Field & W. Allen, JJ., absent.

A contract was made by a city with several persons, by the terms of which the latter were to perform certain work for the city, and, in case of a breach on their part, the city had the right to order them to discontinue work, and to place such persons, and obtain by purchase or hire such animals, carts, implements and tools, as the city engineer might deem necessary, "by contract or otherwise," and to charge the expense thereof to the contractors. A breach took place, the contractors were notified to stop work, the city, intending to act in pursuance of the powers conferred upon it by the original contract, in good faith, and in the exercise of a reasonable discretion, made a new contract with one of the former contractors, in precisely the same terms as those contained in the first contract, he committed a breach of the new contract, and the city took possession of the work, hired men and implements, and completed the work. *Held*, in an action by the city against a surety on the bond of the first contractors, given for the faithful performance of their contract, that the defendant was not released from liability by the notice given to the original contractors to discontinue the work; and that the city had the right to act as it did after the breach of the first contract.

If a person contracts to do certain work for another, and commits a breach, and the other, as he has a right to do under the contract, finishes the work at the expense of the contractor, he is bound to keep an accurate account of the money expended; yet, if by accident a book containing the account is lost, so that the amount cannot be ascertained with exact precision, recovery may be had against a surety on the bond of the contractor for such amount as can be ascertained with reasonable certainty.

A city entered into a contract with certain persons to perform a public work. The contractors committed a breach of the contract, and the city, as it had a

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right to do under the contract, completed the work. *Held*, in an action against a surety on a bond of the contractors, that the city had a right to charge him for services of men who took the place of men whom the contractors would have been obliged to employ, if they had gone on with the work, although the city had employed these men, as inspectors, before the breach. *Held, also*, that the surety was liable for sums paid in settlement of claims for injuries accidentally done to the property of third persons by the blasting of rocks, although no notice of such claims was given to the contractors. *Held, also*, that the surety was not liable for surgical assistance rendered to the workmen who were injured during the progress of the work, nor for sums which the city had paid, after the breach by the contractor, for the wages of workmen hired by the contractors, for services rendered by them before such breach.

COLBURN, J. This is an action upon a bond. The case was referred to an auditor, and comes before us upon the report of a single justice, at the hearing before whom the parties agreed that all the facts found by the auditor were true, though neither party agreed that all the rulings of the auditor, as to the construction of different parts of the contracts, or upon the facts found by him, were legal and correct. The auditor's report states the whole case in detail, his findings on a great variety of questions, and the accounts, containing a great many items; but the questions upon which we are now called upon to pass can be understood by a statement of the general provisions of the contracts, and a particular statement of such parts of the contracts as raise these questions, and the findings and rulings of the auditor thereon.

The original contract was dated August 13, 1875, and was made between the city of Newton, by the water commissioners, of the first part, and Charles Devlin, Jacob M. Long and Edward A. Moore, of the second part. The terms of the contract were, in substance, that Devlin, Long and Moore should furnish the labor and materials for hauling, distributing and laying the main pipes for the water-works of the city of Newton, at certain rates per cubic yard for excavation, and at certain rates per linear foot for laying each size and description of pipe, and at certain other rates for masonry, &c.; the work to be done under the direction, and in accordance with the plans, of the city engineer, and to be paid for upon monthly estimates made by him of the amount of work done, the city reserving fifteen per cent until the completion of the entire contract, the whole work to be completed by June 30, 1876.

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In section A of the contract it is provided that "the said commissioners shall be and are hereby authorized to appoint, from time to time, such person, or persons, as they may deem proper, to inspect the materials to be furnished and the work to be done under this agreement, and to see that the same strictly correspond with the specifications hereinafter set forth."

Section J of the contract is as follows: "The said parties of the second part further agree, that if the work to be done under this agreement shall be abandoned, or if this contract shall be assigned by the parties of the second part, otherwise than as herein specified, or if at any time the engineer shall be of opinion, and shall so certify in writing to the water commissioners, that the said work, or any part thereof, is unnecessarily or unreasonably delayed, or that the said parties of the second part are wilfully violating any of the conditions or covenants of this contract, or are executing said contract in bad faith, the said commissioners shall have the power to notify the aforesaid parties of the second part to discontinue all work, or any part thereof, under this contract, and thereupon the said parties of the second part shall cease to continue said work, or such part thereof as said commissioners may designate; and said commissioners shall thereupon have the power to place such and so many persons, and obtain, by purchase or hire, such animals, carts, wagons, implements and tools as the engineer may deem necessary, by contract or otherwise, as said commissioners may deem advisable, to work at and be used to complete the work herein described, or such part thereof as the engineer may deem necessary, and to use such materials as they may find upon the line of said work, and to procure other materials for the completion of the same, and to charge the expense of said labor and materials, animals, carts, wagons, implements and tools to the parties of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be either due, or may at any time thereafter become due, to the said parties of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be either due, or may at any time thereafter become due, to the said parties of the second part, under and by virtue of this agreement, or any part thereof: and in

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case such expense is less than the sum which would have been payable under this contract, if the same had been completed by said parties of the second part, then the said parties of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum, then the said parties of the second part shall pay the amount of such excess to the party of the first part, on notice from the said commissioners of the excess so due."

Section L is as follows: "And the said parties of the second part further agree that they will indemnify and save harmless the said city of Newton and the water commissioners thereof from all claims, demands, suits and actions, of every name and description, for or on account of any injuries or damages received or sustained by any party or parties in their persons or property by or from the said parties of the second part, their servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said parties of the second part, or their agents, and will at their own proper cost and expense defend any and all such suits and actions; and will execute a bond in such sum and with such sureties as shall be approved by said commissioners, conditioned to indemnify and save said city and said commissioners harmless as aforesaid, and for the faithful performance of this contract by the parties of the second part; and the said parties of the second part hereby further agree that so much of the money due to them, under and by virtue of this agreement, as shall be considered necessary by the Newton water commissioners, may be retained by the said party of the first part until all such suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the said commissioners."

The bond upon which this action is brought is dated August 13, 1875, and was given pursuant to the provisions of said section L. It was executed by the contractors, and by William Baird and Michael Doherty, really, though not nominally, as their sureties, with the condition "that if the said Charles Devlin, Jacob M. Long and Edward A. Moore shall well and truly keep and perform all the terms and conditions of said contract,

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on their part to be kept and performed, and shall indemnify and save harmless the said city of Newton and said water commissioners, as therein stipulated, then this obligation shall be of no effect," &c. Service of the writ was made upon Doherty alone, and he alone defends the action.

The contractors commenced work under the contract, in the fall of 1875, and on May 27, 1876, they were notified by the commissioners, pursuant to the provisions of section J, to discontinue all work under the contract, and they did no work after that date; and, on the same day, notice was duly mailed to the defendant Doherty of these proceedings, and that the board would proceed to complete the work, under the provisions of the contract, and hold him and Baird as sureties upon their bond.

On May 30, 1876, the plaintiff, by its water commissioners, entered into a contract with Charles Devlin, one of the original contractors, for the performance of the work remaining to be done, in precisely the same terms as the original contract, except that the time for completion was extended to September 20, 1876. Devlin entered upon the performance of the work, under this contract, and on June 15, 1876, he was notified to discontinue all work, pursuant to the provisions of section J of the contract, and thereafter the plaintiff, by its water commissioners, proceeded to complete the work stipulated to be done under the original contract, purchasing such materials and procuring such labor as was required, and paying for the same and for such other expenses as were necessarily incurred in performing the work.

The defendant Doherty contended that, as after the notice of May 27, 1876, the contractors could no longer go on and complete the contract, the contract was terminated by the notice, and that he was only liable on the bond for the damages sustained by the plaintiff from the breach of the contract by the contractors, to be determined in the ordinary way.

We are of opinion that the auditor was right in holding that the plaintiff was entitled, under the contract, both as against the contractors and their sureties, to avail itself of the provisions of section J, although it had notified the contractors to discontinue the work.

The defendant further contended, that, by entering into the contract with Devlin, the plaintiff elected not to proceed under

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the provisions of section J, and as, under the second contract, the work was to be done upon precisely the same terms as under the first contract, the plaintiff sustained no damage from the breach of the first contract, except perhaps from some delay in the time of finishing the work, and that, upon the failure of Devlin under the second contract, the plaintiff had no right to proceed, as it did, to finish the work, and hold him as surety; but that, in finishing the work, the plaintiff must be treated as having proceeded under section J of the second contract, and must look to Devlin, under the second contract, for its damages. And that, at any rate, the plaintiff must show that Devlin could not respond to its claim for damages under the second contract.

We are of opinion that the auditor, having found that the commissioners, in making the new contract, intended to act in pursuance of the powers conferred on them by section J of the original contract, and that they made the same in good faith, and in the exercise of a reasonable discretion, as a method of procuring "by contract" the completion of the work, at the least possible cost and loss to the city and the contractors, rightly ruled that they were entitled to do so, and that, upon Devlin's failure under the new contract, they were entitled to proceed as they did, and hold the original contractors and their sureties responsible, under the original contract. If the commissioners had the right to procure everything necessary to complete the work by contract, by a fair construction, they had a right to contract for the completion of the work. If it was necessary for the plaintiffs to show that Devlin could not respond to its claim for damages, it sufficiently appears, by various facts found by the auditor, that want of money was the chief cause of failure, under both contracts, and that, *prima facie* at least, an attempt to recover damages against him alone would be useless.

It appeared that in one item of the account, which was a charge for labor in laying the main pipe, there was erroneously included a charge for labor in laying service pipe, with which the contractors had nothing to do, and that the plaintiffs had attempted to correct this error, by crediting what they considered was the amount paid for labor in laying the service pipe; but, owing to the loss of one of the time books kept upon the

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works, it was impossible to determine with exact precision the amount which had been erroneously charged. The auditor was satisfied, upon the evidence, that he could determine a sum which could not exceed the amount paid for labor upon the main pipe, and allowed that sum. The defendant contended that, as the plaintiff was seeking to hold him to the letter of the contract, as surety, it was bound to keep the accounts with entire accuracy, so as to be able to show the exact amount with which he should be charged; and as it had so kept the account, and lost its books, that it could not do this, but must lose the entire item. But we are of opinion, that, though it was the duty of the plaintiff to keep exact accounts of the work, yet if by a mistake and accident some confusion had occurred, which the auditor was sure he could correct, without an overcharge to the defendant, he proceeded rightly.

It appeared that, while the contractors were carrying on the work, certain persons were appointed and paid by the city to superintend and inspect the work, under section A of the contract, and that after the city took charge of the work the same persons were employed, at the same rate of pay as before, and the amounts paid them charged to the defendants. The defendant Doherty contended that, as the city would have been obliged to pay these men if the contract had gone on, it should not be allowed to charge their pay to the defendants. The auditor found that these men were employed in much additional work, and in services of a different nature from those which they before rendered; that, in effect, they took the places of men whom the contractors would have been obliged to employ, if they had continued the work under the contract in a proper manner; and that the fact that the same men had been previously employed by the city, at the same rate of compensation, in different service, and for a different purpose, did not affect the liability of the defendants to pay their wages, under the provisions of the contract; and we find no error in his conclusion.

There were items representing eight small sums, in the aggregate ninety-five dollars and sixty-eight cents, paid for surgical attendance or transportation to the hospital, where workmen engaged in the employ of the city, in completing the

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contract work, "were accidentally injured, by the blasting of rocks, or the excavating of the trenches, or similar casualties." The auditor found "that the sums so paid were such as common humanity requires to be paid, by any employer, in like cases, where physical injuries are received by his employees, by like accidents, in the course of the employment of a large number of workmen, and such as common prudence and a reasonable regard for economy and personal interest require an employer to pay, in order that he may procure, and retain to the best advantage to himself, the services and labor of proper workmen," and allowed these items as part of the reasonable expense of performing the contract work. Doherty contended that, "whatever were the considerations which induced the city to pay the sums in question, and however good and honorable might have been its motives in so doing, it was under no legal obligation to do so, and therefore it cannot make a third party pay for the expense of its performing charitable acts."

We are of opinion that the defendant Doherty, being liable only as surety, was entitled to stand upon his exact legal rights, and that these sums, though paid under a high moral obligation, were not paid under a legal one, and should not have been allowed.

There were certain items charged for sums paid, generally small amounts, for damages done to property, by the blasting of rock, in excavating the trenches. The auditor found, "that, in the execution of a work of the magnitude here involved, however carefully and skilfully the same may be directed and superintended, some such cases of damage to the property of others as here occurred are inevitable;" that the city exercised due care in the employment of men engaged in blasting; that these damages were inevitable; and that the sums paid in settlement were prudently and judiciously paid; and ruled that, as the execution of the work from which the damages resulted was imposed upon the city by their breach of contract, for that reason, as well as under the express provisions of section L, the contractors and their sureties were liable for the sums paid; and allowed these items, against the objection of the defendant.

We are of opinion that, under the facts found, these items were properly allowed, and that the city was not under obligation

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to notify the defendant Doherty, as he contends, of every trifling demand for damages, and let him defend against it, if he saw fit, any more than they were under obligation to consult him as to every step it took in completing the work covered by the contract.

On June 15, 1876, Devlin, after he had been notified to discontinue work under his contract, executed an order, requesting the city to pay the wages of the men in his employ between June 1 and June 15, while he was engaged in the performance of his contract of May 30, for which said Devlin was directly liable to the men so employed, and which the city was under no obligation to pay. The city paid this order, and the sums so paid were included as items in the account. The city contended that this was part of the expense of completing the work after the breach of the first contract, and was a proper charge in this case. The defendant Doherty contended that, as under section J of the contract of May 30 the city had the right, upon his failure to perform his contract, to retain all sums due or to become due Devlin, and to apply the same to defray the expense incurred in completing the work, the city was bound as to him so to retain and apply the same, and that these items were not properly chargeable to him.

The auditor, against the objection of the city, disallowed the items, and we think rightly. The city, having undertaken to complete the work by entering into a contract with Devlin, was bound, in favor of a surety, at least, on the original contract, to avail itself of any advantage it had acquired, and not make at the expense of the surety a payment it was not legally bound to make.

The city objected to the disallowance by the auditor of other items in the account, but these objections have been waived.

Judgment is to be entered for the plaintiff for the penal sum named in the bond, execution to issue for the sum found due by the auditor, less the sum of ninety-five dollars and sixty-eight cents, with interest from the date of the writ.

Judgment accordingly.

P. Thacher & R. M. Morse, Jr., for the plaintiff.

J. G. Abbott, for Doherty.

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MARGARET TULLY, administratrix, *vs.* FITCHBURG RAILROAD COMPANY.

Middlesex. Feb. 1. — March 6, 1883. FIELD & W. ALLEN, JJ., absent.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, while crossing the railroad on foot, it appeared that the accident occurred in the daytime; that the railroad track was straight for a distance of five hundred feet from the crossing where the intestate was struck, in the direction from which the engine came, and then curved so slightly as to permit an approaching train to be seen for a much greater distance; that it was sixteen feet from certain posts set in a fence, through which the intestate passed in going upon the railroad, to the nearest rail upon which the engine came, and about five feet between the rails; and the only witness who saw the intestate at the time of the accident testified that he was moving quickly. *Held*, that the jury should have been instructed that the evidence would not warrant a finding that the intestate was in the exercise of due care.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, the plaintiff contended that the defendant was negligent in not ringing the bell or sounding the steam-whistle; and that the speed was unreasonable. The only witness upon the first point testified that he did not remember whether or not he heard the bell or whistle. The only evidence as to the rate of speed came from two witnesses. One, who saw the train stop, testified that it stopped forty or fifty yards from the crossing where the intestate was struck. The other witness testified that he noticed that the train, after it had stopped, was about three hundred yards from the place of the accident. *Held*, that there was not sufficient evidence of negligence on the part of the defendant to warrant a verdict against it.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, if the plaintiff fails to sustain the burden of proving negligence on the part of the defendant, no inference can be drawn, adverse to the defendant, from the fact that the engineer and fireman who were in charge of the engine at the time of the accident were in court, and were not called as witnesses by the defendant.

The fact that, in an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate by being struck by a locomotive engine, the jury took a view of the place where the accident occurred, will not warrant the inference that they acquired knowledge of material facts, which were not put in evidence, and which might have influenced their verdict, especially if the view was taken more than two years after the accident and at a different season of the year; or that they rejected as incorrect, from their own observations, the testimony of a civil engineer, who made measurements of certain distances in the vicinity of the place of the accident.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine, if the evidence is conflicting on the question whether the intestate survived his injuries, it should be submitted to the jury.

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If a person, who has been struck by a locomotive engine, remains in a perfectly unconscious condition until his death, his administrator is not entitled, in an action against the corporation owning the engine, to recover substantial damages, in the absence of evidence of any considerable expense or loss incurred between the time of the injury and the death.

TORT, for personal injuries occasioned to the plaintiff's intestate, John Tully, by being struck by a locomotive engine belonging to the defendant, at a footpath crossing in Somerville. At the trial in the Superior Court, before *Rockwell*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. S. Stearns, for the defendant.

G. A. Bruce, (*M. F. Farrell* with him,) for the plaintiff.

COLBURN, J. The first exception of the defendant is to the refusal of the court to rule that there was no sufficient evidence of due care on the part of the plaintiff's intestate.

It was necessary for the plaintiff to show affirmatively that her intestate was in the exercise of due care, or at least that there was nothing in his conduct, either of act or neglect, to which the injury could be attributed, in whole or in part. *Chaffee* v. *Boston & Lowell Railroad*, 104 Mass. 108. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. *Allyn* v. *Boston & Albany Railroad*, 105 Mass. 77. The accident occurred in daylight, a few minutes past six o'clock, P. M., on March 31, 1880. There is no suggestion that there was any fog or mist, or other atmospheric condition, to interfere with the view. The deceased lived near by, and was on foot, having full control over his own movements. The railroad track was straight for the distance of five hundred feet from the crossing where the deceased was struck, in the direction from which the train came, and then curved so slightly as to permit an approaching train to be seen for a much greater distance. It was sixteen feet from the posts set in the fence, through which the deceased passed in going upon the railroad, to the nearest rail upon which the approaching train ran, and about five feet between the rails. The only witness who saw the deceased at the time of the accident testified that he was moving quickly. If we assume that he was walking at the rate of four miles an hour, and that the train was running at the rate of fifty miles an hour, then the train moved twelve and a half feet while he moved a foot. If we

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suppose that it was eight feet from the point of danger, on one side of the track, to the point beyond danger on the other side, then the train must have been within one hundred feet of the deceased before he incurred danger from it, and probably it was within a less distance.

If the deceased failed to look for an approaching train, he was negligent. In *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, Mr. Justice Colt says, "No one can be said to be in the exercise of due care who places himself upon a railroad track without the assurance from actual observation that there is no approaching train." In *Allyn* v. *Boston & Albany Railroad*, *ubi supra*, Mr. Justice Morton says: "A railroad crossing is a place of danger, and common prudence requires that a traveller on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless." If the deceased looked for a train, he must have seen the train approaching, and in such proximity that he could not cross the track without danger, and in that case he was negligent in attempting to cross. There being no conflict of evidence, we are of opinion that the jury should have been instructed that the evidence would not warrant their finding that the plaintiff's intestate was in the exercise of due care. *Allyn* v. *Boston & Albany Railroad*, *ubi supra*.

The next exception of the defendant is to the refusal of the court to rule that there was no sufficient evidence to prove that the defendant was careless or negligent.

The burden was upon the plaintiff to prove the negligence of the defendant. *Lane* v. *Crombie*, 12 Pick. 177. *Allyn* v. *Boston & Albany Railroad*, *ubi supra*. The contention of the plaintiff is, that the defendant was negligent in not ringing the bell or sounding the steam-whistle, and that the speed of the train was unreasonable. These are the only points in which it is suggested that the defendant was negligent.

The only evidence upon the subject of the ringing of the bell or sounding of the whistle came from one witness, and was as follows: "I thought I heard the sound of the train coming, and it sounded to me like the puffing of the engine, and about the bell ringing I cannot say whether I heard it or not. I disremember,

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I was so excited at the time." And in answer to the question, "Did you hear any whistle?" he said, "I don't remember." This was all the evidence; and we are of opinion that it would not warrant the jury in finding that the bell was not rung, or that the steam-whistle was not sounded. If it is urged that, if the bell had been rung or the whistle sounded, the witness would have remembered it, it may be urged, with about the same force, that, if the bell had not been rung nor the whistle sounded, the witness would, under the circumstances, have noticed the omission, and remembered it. No legitimate inference can be drawn from the testimony one way or the other, and the attempt to draw an inference could only end in a mere conjecture.

The only evidence as to the rate of speed of the train was the testimony of one witness, who saw the train stop, that it stopped forty or fifty yards from the crossing; and of another, that he noticed that the train, after it had stopped, was about three hundred yards from the place of the accident. We are of opinion that no inference could be drawn from this evidence that the train passed the crossing at an unreasonable rate of speed. How soon the train would have stopped depended upon the state of the track and the weight of the train, upon the kind of brakes used, whether to be applied by the engineer or by men along the train, and, if the latter, how quickly the men responded to the signal, and upon how promptly, after the accident, the engineer applied the brakes or gave the signal, and how soon he discovered the accident; and upon these points there was no evidence whatever. Neither was there any evidence of how soon a given train at a given rate of speed could be stopped under any given circumstances, and this cannot be considered a matter of common knowledge. We are of opinion that there was not sufficient evidence of negligence on the part of the defendant to warrant a verdict against it.

It is urged by the plaintiff, that the jury might draw inferences from the fact that the engineer and fireman who were in charge of the train at the time of the accident were in court, and not called by the defendant. This would have been so, if the plaintiff had introduced evidence tending to sustain her claim; but she could not prove her case by making allegations,

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and asking the jury to consider them proved because, if they were not true, the defendant had the means of showing it. These witnesses might have been called by either side.

It is contended by the plaintiff that, as the jury had taken a view, they may have had some knowledge of important facts, which they might regard as evidence in the case, which were not within the knowledge of the court; and that the judge could not properly have ruled that there was not sufficient evidence to sustain the plaintiff's case, when he could not be sure that he knew the whole evidence.

Views by the jury may be allowed in all cases, civil or criminal. Pub. Sts. *c.* 170, § 43; *c.* 214, § 11. And, in some cases, the jury have the right to take a view, or either party to require it. Pub. Sts. *c.* 49, § 49. Views are allowed even in capital cases. *Commonwealth* v. *Knapp*, 9 Pick. 495, 515. *Commonwealth* v. *Webster*, 5 Cush. 295.

In many cases, and perhaps in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case. *Parks* v. *Boston*, 15 Pick. 198. Though the knowledge acquired by a jury from a view may be such, in some cases, as to embarrass a court in passing upon the question of the sufficiency of the evidence to warrant a verdict for the plaintiff, or upon a motion for a new trial, for the reason that the verdict is against the evidence, or that the damages are excessive, yet a judge must, in each case, determine, from the circumstances of that case, whether he is so far in possession of all the material evidence as to enable him to act intelligently. The fact that the jury have had a view presents no insuperable obstacle to the granting a new trial, on the ground that the verdict is against the evidence, or the damages excessive. *Harding* v. *Medway*, 10 Met. 465. *Fitchburg Railroad* v. *Eastern Railroad*, 6 Allen, 98.

In the present case, we are unable to see that the jury, from the view, could have acquired any knowledge of material facts which were not put in evidence in court, or that the presiding

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justice could have supposed that they had such knowledge. The view was not taken until more than two years after the accident, and at a different season of the year.

It is suggested by the plaintiff, that the jury might have rejected the testimony of Elliot, as incorrect, from their own observations. We cannot say that this is impossible, but it is so highly improbable as to require little attention. Elliot was a civil engineer, and made measurements, and the material part of his testimony was, that for the distance of five hundred feet, towards Boston, from the posts in the northeast fence, the railroad and rails were straight. He must have testified after the view, as his measurements were not made until the evening of the day of the view, and it cannot with reason be supposed that the jury undertook to reject, as not in accordance with their previous general observations, the sworn measurement of an engineer, which, so far as appears, the plaintiff did not question at the trial.

The next exception of the defendant is to the refusal of the court to rule that there was no sufficient evidence that the plaintiff's intestate survived his injuries a sufficient time to enable the plaintiff to maintain this action.

We are of opinion that there was evidence upon this subject to be submitted to the jury. There was some conflict in the testimony, and it is not readily determined how far the motions and sounds testified to indicated life, or how far they indicated mere spasmodic muscular contractions accompanying a violent death, or how far they may have been caused by moving the body. If the intestate lived after he was struck, though the time might be brief, the cause of action survived. *Bancroft* v. *Boston & Worcester Railroad*, 11 Allen, 34.

The last exception of the defendant is to the refusal of the court to rule that there was no sufficient evidence to prove that the plaintiff was entitled to recover substantial damages.

We think this instruction should in substance have been given, assuming that the plaintiff had maintained her case. All the evidence tended to show that the intestate remained in a perfectly unconscious state ever after he was struck, so that nothing could be recovered for physical or mental suffering; and there was no evidence of any considerable expense or loss

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incurred between the time he was struck and his death. *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90. Bodily mutilation was not an element of damage to the intestate, who had received his death-blow, and ever after remained unconscious.

We have passed upon all the questions, as there must be a new trial, at which the evidence may be different, and deciding one might leave the others to come up again, upon the same facts as now presented. *Exceptions sustained.*

NORMAN S. JEWETT *vs.* SILAS P. BROOKS.

Middlesex. Jan. 31. — March 8, 1883. FIELD & W. ALLEN, JJ., absent.

If A. makes a contract with B., by the terms of which B. is to cultivate A.'s farm on shares for one year from a certain date, and, before the end of the year, A. orders B. off the premises, refuses to allow him to go on under the contract, and lets the land to a third person by a written lease for a year, B. is entitled to maintain an action at once against A., and to recover as damages the value of the contract.

On the issue of the value to the plaintiff of a contract which the defendant has broken, a hypothetical question to an expert which does not accurately state the terms of the contract is inadmissible.

HOLMES, J. The defendant made a contract with the plaintiff, by the terms of which the plaintiff was to cultivate the defendant's farm on shares for one year from April 1, 1880. Before the end of the year, on July 15, 1880, the defendant ordered the plaintiff off the premises, refused to allow him to go on under the contract, and let the land to a stranger by a written lease for a year. On the 22d of the same July, the plaintiff brought this action, and subsequently had a verdict, the defendant alleging a number of exceptions.

The first was to the judge's refusal to rule that, on the pleadings, this action could not be maintained. The ground of this exception seems to be, that a letting on shares is a sort of partnership, and that no action at law can be maintained before a winding up. But, even if there was a partnership, which we do not mean to imply, this rule has no application to the present case. It applies when the subject matter of the claim turns

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out to be an item in a current account, because the plaintiff's right is, not to receive the amount of that item, but only the balance of the account when taken. But when the cause of action is a complete repudiation of the contract on which the relation between the parties is founded, no such reason exists. It is true the pleadings show that performance had so far begun that the plaintiff had expended some time and labor upon the farm, but there were no joint debts or complicated accounts with which a jury might be unable to deal, and the case stands like any other where a contract had been broken after part performance by the plaintiff. *Terry* v. *Carter*, 25 Miss. 168.

The damages, like the contract, were entire, and all accrued on the day when the contract was repudiated. See *Amos* v. *Oakley*, 131 Mass. 413, 417. They were measured by the value of the contract of which the plaintiff was deprived, and did not consist of a series of items, although, for the purpose of estimating the value, the items on each side of the account during the year, as well after as before the breach, were properly admissible. But it is unnecessary to deal with the exceptions bearing on this point more particularly, as a new trial will be necessary for another reason.

Several farmers who had examined the farm on July 24, 1880, were called as experts, and asked the value of a hypothetical contract, the actual contract not having been shown them. Even if this was a proper matter for expert testimony, the contract supposed did not sufficiently correspond with that which was sued upon to make the question admissible. Apart from the great number of details omitted, it was supposed that the plaintiff "was to have one half of everything there," while, by the terms of the contract in suit, there was "no hay to be sold except for taxes," and "as much hay to be left at the end of the year in barn in as good condition and quality as when Jewett commenced." We cannot say how far the assumption that the plaintiff was to have half the hay may have modified the witnesses' answers. *Exceptions sustained.*

J. Hillis, for the defendant.

No counsel appeared for the plaintiff.

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GEORGE R. ASTON *vs.* CITY OF NEWTON.

Middlesex. March 8. — 14, 1883. DEVENS & W. ALLEN, JJ., absent.

A notice to a city stated that a person had been injured in the evening of a day named, while passing along a certain street, and opposite or nearly opposite the house of a person named; and that the cause of the injury was "a water-box within the limits of the highway, and from a foot to eighteen inches from the outside edge towards the centre of the sidewalk on the southerly side of said street, against which the undersigned tripped." *Held*, in an action against the city for the injury, that the notice was sufficient in form, under the St. of 1877, *c.* 234, § 3.

If between the sidewalk of a street in a city and that portion of the street wrought for a carriage-way there is a grassed space, over which a footpath has been worn by use by persons having occasion to enter another street abutting on this street, but not crossing it, or to come in the opposite direction, the city is liable to a person injured by a defect in such path, if the path was known to and recognized by the city as a part of the wrought line of travel, in the absence of any path or other provision made by the city for crossing the street at or near the locality in question, or of any barrier or other warning to indicate that the path as actually used was unsafe or unsuitable.

TORT for personal injuries occasioned to the plaintiff by a defect in a highway in the defendant city. Answer, a general denial. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff gave the defendant a written notice, stating that "on Monday evening, November 24, 1879, while passing along Webster Street in that part of the city of Newton known as West Newton, and opposite or nearly opposite the house of J. A. Fairbanks, he fell, while in the exercise of proper and due care, and received severe injuries to his person. The cause of the fall and the injury was a water-box, water-gate or shut-off, whichever it may be termed, within the limits of the highway, and from a foot to eighteen inches from the outside edge towards the centre of the sidewalk on the southerly side of said street, against which the undersigned tripped." The defendant objected to the sufficiency of the notice; but the judge ruled that the same was sufficient in form to be submitted to the jury.

It appeared in evidence, that there were gravelled sidewalks, about five feet wide, upon each side of Webster Street, wrought and prepared for travel, connected directly with the sidewalks of streets connecting with Webster Street; that between these

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walks and the wrought carriage-way there was a grassed space sloping slightly to the carriage-way, about three feet in width, and which had partly overgrown the sidewalk at the outer edge; that on the south side of the street, along the line of the inner border of the grassed space, there was a row of trees; that a diagonal footpath from the corner of Warren Avenue, which abutted on this street, but did not cross it, and from the north to the south side of said street, had been worn by the feet of passengers over and across the grassed space upon the south side of the street to and upon the sidewalk, this being a shorter way, and the usual way in which many people walked in going to and from the railroad station.

The alleged defect was a wooden box, about four inches square, with an iron cover or plug set therein, which box was used for letting on the city water to a house situated on the south side of said street, opposite thereto, and shutting off the same therefrom. The box projected above the surface of the ground about it, and was connected with the works of the defendant city used in supplying its inhabitants with water. This box had been originally placed level with or a little below the surface of the ground, but in some manner had worked up. The time the box had so projected was in dispute, the evidence showing it to be from one month to one year. The box was within the line of the grass border on the south side of the street. There was evidence tending to show that said box was in the diagonal footpath, and there was evidence tending to show that it was not in said path, but at the left of it. No crossing had ever been prepared by the city where this path was, but a distinct path was worn there by the feet of people who walked across the street, and there was no evidence that any other crossing had been prepared by the city across Webster Street at the corner of Warren Avenue.

The defendant requested the judge to instruct the jury as follows: "1. If the water-box, the alleged defect, was between the carriage-way and the sidewalk, and not in the travelled part of either, and not in the footpath, then the city is not liable. 2. If the water-box was between the sidewalk and the carriage-way, and within that part of the limits of the way where the city may place trees, posts and curbstones to designate the width of

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the sidewalk, the city is not liable. 3. The city has worked and prepared for public travel such parts of Webster Street as are reasonably necessary for that purpose. 4. The city is not bound to keep all the way by the sidewalk in an equally suitable and convenient condition for crossing.

The judge gave the first instruction requested with this modification: "If the diagonal path had been known to and recognized by the city as a part of the wrought line of travel, then the city was bound to keep it in repair;" and gave the second instruction requested with this qualification: "If said box was in the diagonal path known and recognized by the city as a part of the travelled way, the city was liable to keep it in repair." The judge had elsewhere instructed the jury, without objection, that if said diagonal path had been, by long-continued public use, with the knowledge and acquiescence of the city, recognized as a part of the wrought and finished path, then the city would be liable to keep the same in repair, and not otherwise. The third instruction requested was refused; and the judge gave the fourth, with this addition: "It is a question of fact for you to decide, whether they were bound to keep this particular place in order or not."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

P. Thacher & W. S. Slocum, for the defendant.

S. B. Allen & G. W. Morse, for the plaintiff, were not called upon.

C. ALLEN, J. The ruling that the notice was sufficient in form was correct.

From the description which is given of the place which is complained of, it would seem that the grassed space between the gravelled sidewalk and that portion of the street which was wrought for a carriage-way was not adapted for the travel of those who merely had occasion to walk along the south side of Webster Street on the sidewalk; but in order to cross the street so as to reach Warren Avenue, or to cross from Warren Avenue to the south side of Webster Street, it would be necessary to pass over this grassed space, and, no path having been prepared by the city for this purpose, a diagonal path had been worn by use. Under the instruction of the court, the jury must have found

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that this path had been known to and recognized by the city as a part of the wrought line of travel. Under this state of things, the circumstance that the city had not itself prepared the crossing at this place is immaterial. The crossing might well be established by long-continued public use, and there was nothing to show that the city had either made any other provision for crossing the street at or near that place, or had in any manner indicated, by barriers or otherwise, that the path as actually used was unsafe or unsuitable. It was virtually conceded, on the part of the defendant, that the water-box, in its condition at the time of the accident, was a defect, if the city was bound to keep the place where it was situated safe and convenient for travel. The requested instructions, therefore, were properly dealt with. *Weare* v. *Fitchburg*, 110 Mass. 334, 337. *Whitford* v. *Southbridge*, 119 Mass. 564, 574. *Exceptions overruled.*

PHILIP CONNERS *vs.* LORING LOKER.

Middlesex. March 22. — 26, 1883. DEVENS & W. ALLEN, JJ., absent.

The mere driving cows off a person's land into the highway, and detaining them there until the owner comes and takes them away, and then demanding a sum of money as damages, is not, as matter of law, an impounding of the cows.

TORT, for breaking and entering the plaintiff's close in Chelmsford, in October 1881. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff's evidence tended to show that he found the cows of the defendant in one of his fields, doing damage; that he drove or caused the cows to be driven from the field into the highway, and immediately notified the defendant of what had occurred; that the defendant, who lived within half a mile of the plaintiff's land, went at once to the place where the plaintiff had the cows in the highway; that the plaintiff then demanded of the defendant five dollars for the damage done by his cows upon the plaintiff's premises, and said to him that, if he did not pay the five dollars, he would sue him for the same; that the

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defendant refused to pay the five dollars, and thereupon took possession of his cows, without any objection on the part of the plaintiff, and drove them back to his own premises; and that the plaintiff did not attempt, or make any claim of a right, to distrain the defendant's cows until the defendant should pay the sum demanded.

The judge instructed the jury, that, if the plaintiff found the cows of the defendant doing damage on his land, he might recover his damages in an action of tort against the defendant, or he might distrain the cows; and that if the plaintiff distrained or undertook to distrain the defendant's cows, and by that means to enforce the payment of the five dollars demanded by him, he could not now maintain this action for the recovery of the sum so demanded.

No objections were made to the instructions given to the jury; but, after the instructions had been given, the defendant requested the judge to instruct the jury that, if the plaintiff took the cows of the defendant from the plaintiff's premises, drove them away and detained them, and kept them under his control until the arrival of the defendant, whom the plaintiff had sent for, and, when the defendant came, demanded of him five dollars as damages done by the cows on the plaintiff's premises, such act of the plaintiff was an impounding of the cows, and the plaintiff could not recover such damages in this action. The judge declined to give this instruction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. Ladd, for the defendant.

G. Stevens & G. H. Stevens, for the plaintiff.

By the Court. The plaintiff had his election of remedies for the damages to his land by the cows of the defendant, either by impounding them or by an action of tort. Gen. Sts. *c.* 25, § 25. Pub. Sts. *c.* 36, § 27. The mere driving the cows out of his land into the highway, and detaining them there until the owner came and took them away, and then demanding five dollars as damages, was not, as matter of law, an impounding of the cows by the plaintiff.

The court properly refused the instruction requested by the defendant. *Exceptions overruled.*

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CHARLES L. FARNSWORTH & others *vs.* JAMES G. LOWERY & another.

Norfolk. March 5, 1881; January 4. — March 2, 1883.

If the report of a commissioner, to whom a petition to establish the truth of exceptions has been referred, states that the bill of exceptions tendered would be conformable to the truth with certain words stricken out, and certain other words added, and the changes suggested are immaterial, the truth of the exceptions will be taken as established.

A declaration in an action of tort alleged that the defendant converted to his own use "a permanent sign, bearing the name of the plaintiff, placed in an advertising case, said sign being the property of the plaintiff." *Held*, that the plaintiff could recover only the value of the sign, and not the value of the case.

Evidence that a person, claiming title in a case, wrongfully removed from the case certain glass plates, and left them with the person in whose custody the case had been, and took the case away, is not sufficient to maintain an action for the conversion of the plates, even if the owner of them was ignorant that they were left with such person.

PETITION to establish the truth of exceptions alleged by the petitioners in fourteen actions severally brought by them against James G. Lowery and John Bleakie, and disallowed by *Bacon*, J., who presided at the trial of the cases in the Superior Court.

The petition was referred by this court to a commissioner, to hear the parties and report his findings. The commissioner reported that the bill of exceptions as tendered by the petitioners would be conformable to the truth, if certain words were added, and certain other words were stricken out. The bill of exceptions so altered was as follows, the words printed in italics being those which the commissioner reported should be stricken out, and the words in brackets being those which the commissioner reported should be inserted:

"These are actions of tort, and by agreement of parties were tried together in the Superior Court, by which each of the several plaintiffs sought to recover for the alleged conversion of a permanent sign bearing his name placed in an advertising case in the post-office room in Hyde Park, Massachusetts, and being there kept by him for the purpose of advertising his business. The pleadings in one case, and the photograph of the bulletin

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board used at the trial, may be referred to.* The defendant Lowery, in the summer of 1877, sold to one G. Henry Perkins a large bulletin board, the central portion of which contained a large perpendicular mirror, surrounded by a black-walnut frame, and the board at either side of said mirror and frame comprised eight equal compartments, each of which was twelve inches in length, eight and one half inches in width, and at either end of the mirror was a compartment of a larger size than the ones at the side of the mirror, all of which were enclosed within a heavy black-walnut frame, the said compartments being separated from each other by a horizontal black-walnut bar, which extended from the frame which surrounded the glass mirror to the frame which enclosed the whole board, and forming right angles with both frames, [that part of the bulletin board herein designated as 'compartment' being of wood, with a board back, except so much thereof as is shown on the photograph as a glass plate set in each, with the name and business of a plaintiff thereon. No evidence was offered in the case, or at the trial, as to the manner in which said plates were attached to said frame or separable therefrom. Nor as to the question whether or not, or how, any part of the woodwork of the board or compartments could be separated from other parts of the board, or of the compartments, squares or spaces (as they were variously styled). But it appeared that said entire board, including the compartments, was at the time of the alleged sale of said spaces or compartments hereinafter named, by one Perkins, to these several plaintiffs, fully constructed and completed, ready for the reception of said plates.]

"*It appears from* the testimony in behalf of the plaintiffs at the trial of said cases [tended to show] that, after Perkins became the owner of the property in question, he sold to each plaintiff, except the plaintiff Pollard, (to whom he made a present, which was accepted,) one of said compartments, *with a glass plate fitting and secured therein*, [and that he then agreed to

* The declaration was as follows: "And the plaintiff says the defendants in 1878 converted to their own use a permanent sign, bearing the name of the plaintiff, placed in an advertising case in the post-office room in Hyde Park, said sign being the property of the plaintiff, and being there kept for the purpose of advertising his business." Answer, a general denial.

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furnish and insert therein a glass plate,] lettered in the same manner as the sign or business card of the person purchasing as aforesaid, and a right in common with the other plaintiffs and like purchasers and owners in the mirror and frame, or the parts of the bulletin board not included within said compartments; that Perkins, according to agreement with the plaintiffs, [furnished and affixed the glass plates, and] placed said board in the corridor of the post-office, after the glass plates had been placed therein as aforesaid; that it was to be there kept for the purpose of advertising the business of the plaintiffs till such time as they (the plaintiffs) would agree between themselves to have it removed to some other place; [there was some evidence tending to show] that Perkins retained no interest whatever in said board, or in anything thereon or connected therewith, and, at the time of the alleged conversion, that these plaintiffs owned the [portions of] *property* [bulletin board,] which they [claimed to have] bought, as hereinbefore stated. Each plaintiff offered to show the value of what he claimed to be his permanent sign, *which* [saying that this] included the plate aforesaid, and the said compartment, or the part of the board on which the glass was placed and secured, as aforesaid, for the purpose intended by him, and the plaintiffs claimed they sought to recover the value of this property, and that these actions were commenced for that purpose; but the court excluded this testimony, and ruled 'that the plaintiffs could recover on their declarations only for the glass and lettering thereon.'

"*It also appeared from the testimony* [there was evidence tending to show,] in behalf of plaintiffs, that one John M. Twichell, who is a deputy sheriff for said county of Norfolk, advertised said bulletin board, and on the 29th day of June, 1878, he *went through the form of selling* [sold the interest of said Perkins in] the same, in the office of the town clerk in said Hyde Park, as the property of said Perkins, who was present at the sale, and then and there stated publicly, in the presence of the defendant Bleakie, 'that the bulletin board was not his, and that he had no interest in it;' that the defendant Bleakie bid twice on said board afterward, and it was knocked off to him by said Twichell, who acted as auctioneer; that immediately after said sale one of the plaintiffs warned the defendant Bleakie

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against touching or in any way interfering with said board; that Bleakie stated to Perkins, a few days after the said sale to him, Bleakie, 'that he bought the bulletin board and would take it away;' that, on the 12th day of July, 1878, the defendant Lowery came into the post-office and said, 'I come to take the bulletin board. It belongs to me. I have a bill of sale of it.' Charles P. Vaughan, the person to whom these remarks were addressed, and whose place of business was then in the post-office room, protested, in behalf of one of the plaintiffs, against the removal of said board; that, as the defendant Lowery commenced to take said board from its assigned place and position in the post-office room, Vaughan went off to look for and report to the plaintiff, who directed him to prevent the removal of said board; that when Vaughan and this plaintiff returned to the post-office, the said bulletin board had been placed in an express wagon in front of the post-office, but the glass plates had been taken therefrom [by the defendants, who exercised reasonable care, doing them no damage, and placed them on his counter,] while Vaughan was absent, as aforesaid; both defendants, and the expressman who was in charge of the team, were then near the said wagon, and the defendants went off together, after the said wagon and board, which has never been returned. Vaughan then returned to his place of business, and he testified, on cross-examination, 'that he there found, on the corner of his counter, after the defendants and said team had departed, the glass plates bearing the names of the plaintiffs, and which belonged in the bulletin board, as aforesaid; that he put the glass plates away into a closet, where they were at the time of the trial without instructions from any one; *that, in doing this, he acted on his own responsibility, and that no person called for said plates up to that time; that the majority of the plaintiffs were not aware that the glass plates, bearing the names of the plaintiffs aforesaid, were left in the post-office room, or in Hyde Park, and they believed that all parts of said board, including said glass, had been taken away from said room by the defendants, or either of them, till they heard the testimony of Vaughan as aforesaid,* [except as appears from the fact that he was left in charge of the board and forbade its removal, or the other foregoing statements, and that no one of the plaintiffs had taken possession of them; nor did it

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appear that all of the plaintiffs knew they had been left there.] The plaintiffs did not in any way admit that Twichell had any right to sell any part of the property in question, but they claimed that the sale by him was unauthorized and irregular. At the conclusion of the testimony for the plaintiffs, the court ruled, by request of the defendants' counsel, that there was no evidence of a conversion, and instructed the jury to return a verdict for the defendants in each case; whereupon verdicts were so returned. To the rulings and instructions aforesaid the plaintiffs except, and they respectfully pray that their exceptions may be allowed."

The judge who presided at the trial made, upon the bill of exceptions tendered to him, the following certificate:

"At the trial I ruled that the plaintiffs could not, under their several pleadings, recover for anything except the value of the letters, glass signs secured in and to the bulletin board or advertising case, and also that there was no evidence for the jury of any conversion of said glass signs by the defendants, to which ruling the plaintiffs duly excepted. The plaintiffs not having presented these exceptions in this bill with reasonable fairness and precision, and having neglected so to amend this bill of exceptions as properly to present said exceptions for allowance, I return this bill of exceptions to the files disallowed."

The commissioner also reported that the judge who presided at the trial prepared a bill of exceptions, which he was willing to allow, and which was a substantially true statement of the facts in the case, unless certain words should have been inserted. The judge's draft, with the words which the commissioner suggested might be material printed in brackets, was as follows:

"These are actions of tort, and by agreement of parties were tried together, by which each of the several plaintiffs sought to recover for the alleged conversion of a permanent sign bearing his name, placed in an advertising frame or case, in the room of the post-office, in Hyde Park, and being kept there for the purpose of advertising his business. The pleading in one case may be referred to as being the same in substance in each of the other cases, and also a photograph of said frame or bulletin

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board used at the trial. The evidence tended to show that said bulletin board, placed as aforesaid, containing in the several compartments glass plates fitted and secured therein, lettered like a sign or business card of each of said plaintiffs, as shown in said photograph, and the plaintiffs claimed to recover, in these actions, the value of the plate-glass sign aforesaid, and also the value of that part of the frame on which the sign was placed and secured, and that the word 'sign' in the declaration included not only the glass plate, but also that part or compartment of the frame or case to which the plate was secured and which held it in place.

"[And there was evidence in the case tending to show that the plaintiffs had severally purchased of one Perkins, and so owned, at the time of the alleged conversions of that part of the woodwork or frame, claimed as aforesaid, or some part of said frame other than the glass plate.]

"But the court ruled that the plaintiffs could only recover under their several declarations for the glass plates and lettering thereon, and excluded evidence of the value of any part of the frame or case to which said glass plates were secured, to which rulings and exclusions of evidence the plaintiffs excepted. There was another action of tort for the conversion of the frame or case to which these glass plates were secured, brought by these plaintiffs and others, which was tried at the same time, but in this last-named case the jury disagreed. The declaration in said case may be referred to, and is annexed hereto. The only evidence that tended to show a conversion of said glass plates or signs was that the said frame, case or bulletin board having been sold as the property of one Perkins (and whether rightfully so sold was one of the questions tried in the case in which the jury disagreed) to the defendant Bleakie, the defendants under such sale (and) claiming to hold said bulletin board thereunder, took from said case in the post-office room aforesaid said glass signs, and, placing them carefully upon the counter in said room, left them there, and carried away said bulletin board, frame or case, and did no other act or thing tending to show a conversion thereof. The court, at request of defendant, ruled that this did not prove a conversion, and instructed the jury to return a verdict for the defendants in all of said cases,

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and said verdicts were so returned, and to said ruling and direction of the court the plaintiffs severally excepted."

W. B. Gale & J. E. Cotter, for the petitioners.

C. Sewall & F. D. Ely, for the respondents.

FIELD, J. We think the substantial truth of the exceptions presented has been established, and that the matters which the commissioner has found should be stricken out or inserted are immaterial. The exceptions proved do not in our view differ materially from the exceptions which the presiding justice was willing to allow.

The first ruling excepted to is, "that the plaintiffs could recover on their declarations only for the glass and the lettering thereon." The declarations were for the conversion of "a permanent sign bearing the name of the plaintiff, placed in an advertising case in the post-office room," &c. In the construction of pleadings it may sometimes be necessary for the court to consider the subject matter as it appears in evidence, and if, when applied to the subject matter, the meaning of the pleadings is doubtful, it is the duty of the party pleading to ask leave to amend them so that the meaning may be made clear. The declarations are for the conversion of a sign placed in a case, and, as applied to the evidence, might well be held to include only the glass, which, with the lettering thereon, was placed in the case, and not to include any part of the case itself.

The remaining exception is to the ruling of the court that there was no evidence of a conversion of the glass plates. There was evidence that the defendants, under a claim of property in the advertising case, removed the glass plates from it and placed them on the corner of a counter in the post-office room, where they were found by one Vaughan, whose place of business was in this room, and they have been since kept by him in a closet "without instructions from any one."

It does not distinctly appear in whose custody this case was, after it was placed in the post-office room, but, so far as appears, it was in the custody of Vaughan, who it seems acted for one of the plaintiffs in forbidding the defendants to remove it. No evidence appears that the defendants claimed any property in the glass plates. It is not necessary to consider what were the rights of property which each plaintiff had in the advertising

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case, or what the form of remedy is, if the defendants have wrongfully taken and carried it away.

The question here presented is of an alleged wrongful removal of the glass plates from the case by the defendants, under a claim of owning the case and having a right to take it down and carry it away. There was evidence that Perkins retained no interest in the case, and therefore none could be taken and sold on an execution against him, and therefore the defendants had no right, title or interest in the case. For the purpose of deciding the question of law presented, it must therefore be assumed that the defendants had no right to take down the case and carry it away, and that the removal by them of the glass plates from the case was wrongful. It is contended that this wrongful removal of the plates from the case was a conversion, because it is an exercise of dominion over them inconsistent with the rights of the plaintiffs. But the dominion which the defendants exercised in removing the plates from the case was exercised, not by virtue of any claim of property in the plates, or of any right of possession or control over the plates, but by virtue of a claim of a right of property in the case with which the plates were connected, and there is no evidence recited which would have warranted the jury in finding that the defendants removed the plates from the case for any other purpose than that of separating the property of the plaintiffs from the case which the defendants claimed to own, that they might take and carry away only the property they claimed. Such a wrongful intermeddling with plates, we think, does not amount to a conversion. There was no intent to deprive the plaintiffs of their property in, or of their rights of possession over, the plates, and no actual deprivation. The removal was incidental to the taking and carrying away of the case, and the plates continued in the custody of the person who, so far as appears, was in possession of the room in which the case was placed, and had the custody of the case. The evidence of a conversion is no stronger than if it proved that a stranger without right had taken the plates from the case and left both in the room. This would be a trespass, but not a conversion. The want of knowledge of some of the plaintiffs that the plates were left with Vaughan is immaterial, if he were the person who was in possession of

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the room where the advertising case was, and had the custody of it. *Foulkes* v. *Willoughby*, 8 M. & W. 540. *Simmons* v. *Lillystone*, 8 Exch. 431. *Strickland* v. *Barrett*, 20 Pick. 415. *Spooner* v. *Holmes*, 102 Mass. 503, 507. *Exceptions overruled.*

WILLIAM MANSFIELD *vs.* MARY SHEPARD.

Norfolk. Jan. 31. — March 2, 1883. FIELD & W. ALLEN, JJ., absent.

If a person has a privilege of taking stones and gravel from land of another, where it is most convenient and least prejudicial, to build and repair a dam and canal, and a privilege of passing and repassing from a road through the land with teams, by gates or bars, for the purpose of building and repairing said dam and canal, where most convenient and least prejudicial, the owner of the land subject to the easement is entitled to reasonable notice of the intention of the owner of the easement to make repairs, before being liable to an action for obstructing the right of way.

TORT for obstructing an easement. Trial in the Superior Court, without a jury, before *Gardner*, J., who found for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

T. E. Grover, for the plaintiff.

E. Ames & F. D. Ely, for the defendant.

MORTON, C. J. This case is not distinguishable from *Phipps* v. *Johnson*, 99 Mass. 26. In that case, the plaintiff had a right to pass and repass over the defendant's land, "for the purpose of repairing his building at all times when necessary." It was held that the defendant was entitled to reasonable notice that the plaintiff was about to repair, before being liable to an action for obstructing the way.

In the case before us, the plaintiff has a similar easement over the land of the defendant. He has "a privilege of taking stones and gravel on our land, where it is most convenient and least prejudicial, to build and repair said dam and canal; also a privilege of passing and repassing from the road through our land to said premises, with teams, &c., by gates or bars, for the purpose

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of building and repairing said dam and canal, where most convenient and least prejudicial."

The obstruction complained of consists of a strong, substantial fence, having in it a gate four feet wide, which the defendant keeps locked, which fence, when the gate is closed, prevents the plaintiff from passing and repassing to procure gravel for the repair of his dam, as he has been accustomed to do.

The grant to the plaintiff does not give him the right to pass at all times. He has only a right to pass when it is necessary to repair his dam. Intervals of uncertain length must occur in which there would be no occasion to use the way. The defendant has the right to make any use of her land which is not inconsistent with this occasional right of way.

To hold that she is bound at all times to keep the way free from obstructions would unreasonably deprive her of the use of her land. This is not necessary for the protection of the plaintiff. The building of the fence is not in itself a denial of his right of way, and there is no hardship in requiring him, when he has need to use the way, to notify the defendant so that she may open the gate, or, if the plaintiff has the right, and insists upon it, to pass with teams, may enlarge the opening. Otherwise, the right to an occasional use would be converted into a right of a permanent and constant use.

It is not necessary to consider what might be the rights of the plaintiff as to removing the fence in the case of a sudden freshet, or other exigency, requiring immediate repairs of the dam. Such a case is not here presented.

We are of opinion that the ruling of the Superior Court, that the defendant was entitled to a reasonable notice before she was liable to be sued for an obstruction, was correct.

Exceptions overruled.

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JANE JOHNSON *vs.* CHARLES DUNN.

Norfolk. Jan. 31. — March 5, 1883. FIELD & W. ALLEN, JJ., absent.

A surveyor of highways, who enters upon private land and removes an accumulation of ice and snow in a watercourse thereon, which has caused the water to overflow and obstruct the highway, is not liable to an action by the owner of the land for injury done to his lower land by reason of the water overflowing the same and washing away the soil, if the acts of the surveyor were the necessary means for the removal of the nuisance, and he acted with due regard to the safety and protection of the land from needless injury.

TORT, for breaking and entering the plaintiff's close in Medfield, and doing certain acts thereon. The defendant justified as a surveyor of highways in that town. Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, in substance as follows:

An ancient watercourse, which flowed across and under the highway adjoining the plaintiff's land, and through her land, had become so obstructed by ice and snow in the plaintiff's land that the water was thereby set back and overflowed the highway and obstructed the same, rendering it inconvenient and unsafe for travel.

Complaint of the condition of said highway was made to the chairman of the board of selectmen of the town, and he requested the defendant, in whose district, as surveyor of highways, this place was, to remedy said defect in the highway. The defendant, acting as such surveyor, entered upon the plaintiff's land and removed the obstructions of ice and snow from said watercourse, thereby causing the accumulated water to overflow the banks of the watercourse, and wash away some of the soil of a piece of ploughed land of the plaintiff lying near the watercourse, but at a considerable distance below, and not in sight from the place where the defendant worked in clearing out the same.

The judge instructed the jury, that, if the highway was unlawfully obstructed by water, by reason of the negligence of the plaintiff in not clearing out and keeping open the watercourse on her land, or by her suffering the same to be filled up with snow and ice, whereby the water had set back upon the highway, the defendant had the authority, he deeming the obstruction to the highway to be a public nuisance, which the safety and

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convenience of public travel required him to remove, to enter on the plaintiff's land for the purpose of opening the watercourse, and to clear out the ice and snow therefrom in a proper manner, and so as to let the water upon the highway flow off through the same; the acts of the defendant being necessary means for the removal of the nuisance, and he doing as little damage as possible to the plaintiff's land, and having due regard in whatever he did to the safety and protection of the plaintiff's land lower down on the stream from needless injury by reason of his acts.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. Lowell, Jr., for the plaintiff.

J. Hewins, for the defendant.

DEVENS, J. Upon the facts as they must have been found by the jury under the instructions of the court, the highway was unlawfully obstructed by reason of the negligence of the plaintiff, in permitting an ancient watercourse upon her land to become choked by snow and ice so that the water was set back upon it; and the defendant, acting as highway surveyor, deeming it a public nuisance which his duty required him to remove, entered upon her land, opened the channel of the watercourse in a proper manner, so that the water upon the highway could flow off, the acts done by the surveyor being necessary means for the removal of the nuisance, and due regard having been had by him, in whatever was done, to the safety and protection of the plaintiff's land lower down the stream from any needless injury.

The acts done by a surveyor in that portion of the highway within the limits of his jurisdiction, for the purpose of repairing the same or of removing obstructions therefrom, are strictly within the scope of his official duty; his judgment is conclusive upon their necessity, the motives upon which he acts are not important, and the only remedy afforded to the landowner is under the provisions of the statute, when an injury occurs such as is there contemplated. *Denniston* v. *Clark*, 125 Mass. 216. The duty of towns to keep their highways safe and convenient, so that travellers may pass and repass thereon at all seasons of the year, is discharged by means of the highway surveyors, who are to remove whatever obstructs or encumbers them, or

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whatever may hinder, incommode or endanger those travelling thereon, and their decision is not subject to revision. Gen. Sts. *c.* 44, §§ 1, 8. *Morrison* v. *Howe*, 120 Mass. 565. They are public officers, and not mere servants or agents of the town, and are subjected to severe penalties for a failure to perform their official functions. *Walcott* v. *Swampscott*, 1 Allen, 101. Gen. Sts. *c.* 18, §§ 74, 75.

The instructions do not suggest that there would be any such protection to the defendant in doing the acts complained of as would be afforded had they been done within the limits of the highway. The owner of land through which a watercourse flows may enter upon the land of another lying below his own, and remove any unlawful obstruction which causes the water to flow back upon his land, exercising proper precautions for the safety and protection of the property of him upon whose land he enters. *Hodges* v. *Raymond*, 9 Mass. 316. *Colburn* v. *Richards*, 13 Mass. 420. Where a public way is unlawfully obstructed, an individual may enter on the land of the party erecting or continuing the obstruction, and remove it, doing as little damage as possible to the soil and buildings. *Arundel* v. *M'Culloch*, 10 Mass. 70. *Elder* v. *Bemis*, 2 Met. 599, 601, 605. The instructions apply these principles to the duties of the surveyor who finds the highway obstructed by the act or neglect of a person owning land outside of the highway; and they are sufficiently favorable to the plaintiff. They attribute only to the surveyor the same rights which a private owner has when he finds his land invaded in a similar manner, or which the traveller possesses when he finds his way obstructed. Unless the surveyor may do what the instructions contemplate, there is no public officer competent to act under such circumstances, and the highway must remain impassable, or be swept away by wrongful acts which no individual will undertake to remedy. In subjecting the surveyor who enters upon private lands and removes the obstructions which flow water back upon the highway to the risk of being treated as a trespasser, should the act or neglect be found not to have been unlawful, or should the means adopted by him be found not to have been proper and necessary, the rights of the landowner are fully protected.

Exceptions overruled.

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W. H. H. BRAYMAN & another *vs.* JOSEPH WHITCOMB.

Barnstable. Nov. 14, 1882. — March 2, 1883. W. ALLEN & HOLMES, JJ., absent.

Under the Gen. Sts. *c.* 152, § 7, authorizing a justice of the peace to take the recognizance of a debtor "in any case where it might be taken before the clerk of the court," and § 2, providing that "the recognizance may be taken before the Superior Court in any county in term time, or before the clerk of the court in vacation," a justice of the peace has no authority to take such a recognizance on a day when the Superior Court stands adjourned to another day in the same term; and an execution issued on the recognizance is void.

If an officer sells goods taken on a void execution, after having been notified by a creditor, who has placed in his hands another execution against the same debtor, that he claimed the first execution to be void, and that, if the officer sold the goods under it so that they could not be taken upon his execution, he should hold him responsible therefor, such creditor, by purchasing the goods at the sale and receiving possession of them, is not estopped from maintaining an action against the officer.

TORT, against a deputy of the sheriff of Barnstable, for releasing and discharging, within thirty days after judgment for the plaintiffs in an action brought by them against Isaac H. Fish, certain goods from an attachment made by the defendant on the writ in said action. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found and ordered judgment for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

J. M. Day, for the defendant.

H. P. Harriman, for the plaintiffs.

C. ALLEN, J. The execution, in favor of Charles A. Raymond, upon which the defendant sold the goods, upon a seizure made previous to the attachment thereof upon the process sued out by the plaintiffs, issued upon a recognizance taken before a justice of the peace, by virtue of the Gen. Sts. *c.* 152, § 7. As the authority of the justice of the peace to take such a recognizance is to do so "in any case where it might be taken before the clerk of the court," we are necessarily referred to § 2. This section, so far as it is important to the present inquiry, is as follows: "The recognizance may be taken before the Superior Court in any county in term time, or before the clerk of the court in vacation." Upon the facts found, the Superior Court

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was not in actual session on Saturday, the day when the recognizance was taken, having adjourned from Friday to Monday, but not having adjourned the term without day. In the statute, the word "vacation" is used in contradistinction to "term time;" indicating an intention to use it in its legal sense. The English legal year was divided into four terms of different lengths, separated by the vacations, which were the seasons of the great festivals or fasts, or were deemed necessary on account of the avocations of rural business. And in this country courts have their terms and vacations. *Bronson* v. *Schulten*, 104 U. S. 410, 415. The legal definition of the word "vacation" is that period of time between the end of one term and the beginning of another. Bouvier's Law Dict. We are to consider the Legislature, when dealing with subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of words in a more popular sense. *Merchants Bank* v. *Cook*, 4 Pick. 405, 411. The intervals of time between the actual sessions of court when conducting the business of a term cannot be called vacations, and, as there was a present existing term of the Superior Court, no authority existed to take the recognizance in question.

The execution which issued upon the recognizance was therefore void. It issued from a magistrate having no jurisdiction, and it did not recite any facts which purported to show that he had such jurisdiction. The act of the officer in selling the goods was a trespass, and such sale conveyed no title, even to an innocent purchaser. *Kennedy* v. *Duncklee*, 1 Gray, 65. At the sale, the defendant was notified by the plaintiffs that they claimed that the execution was void, and that, if the defendant sold the chattels under it, so that he could not take them upon their execution, they should hold him responsible therefor. The defendant nevertheless proceeded with the sale, and the plaintiffs themselves purchased and paid for the chattels, and received possession thereof. It is therefore to be determined whether this act has deprived them of their remedy against the defendant.

There appears to be no doubt that Fish, the defendant in the original action, and the original owner of the goods, might have maintained an action against the defendant, or against the

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plaintiffs, and perhaps against both. *McPartland* v. *Read*, 11 Allen, 231. *Gilmore* v. *Newton*, 9 Allen, 171. But a majority of the court is of the opinion that this circumstance does not have the effect to preclude the plaintiffs from maintaining their action against the officer. The gist of the action is, that he discharged their attachment, and failed to secure to them the benefit of an opportunity to levy their execution upon the attached property. It is not necessary for them to show that he made a valid sale, or any sale at all, upon the execution of Raymond. Their case rests upon his neglect of the duty which he owed to them. They have not consented to his act of giving up their attachment, or done any act by which he was misled into supposing that they so consented. On the other hand, they protested against it, gave notice to him that they should hold him responsible, and in no manner acquiesced in the determination to which he came; and he so understood. Nevertheless he determined, in full view of the consequences, to give up their attachment. So far as the plaintiffs are concerned, it is the same as if he had surrendered the goods to the original owner, or to another attaching officer.

Under these circumstances, the facts that the plaintiffs bid at the sale, that the property was struck off to them, that they became the purchasers, and took and paid for the property, will not operate as an estoppel, or defeat their action.

Exceptions overruled.

COMMONWEALTH *vs.* ORVILLE M. BRAILEY.

Hampshire. Sept. 26, 1882. — March 5, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

An indictment under the Gen. Sts. c. 161, § 2, which prescribes a penalty for wilfully and maliciously burning in the night-time the manufactory of another, "being, with the property therein contained, of the value of one thousand dollars," alleged that the defendant, at a time and place named, in the night time, "feloniously, wilfully and maliciously did burn a certain manufactory, used for the manufacture of fishpoles, the same being, with the property therein contained, of the value of one thousand dollars, of the property of one P." It appeared at the trial that the building burned was the property

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of P., and was of the value of four hundred dollars; that the personal property contained in the building belonged to one B., excepting property of a small amount in value, which belonged to the defendant; and that the property belonging to B. was of the value of one thousand dollars. *Held*, that there was not a fatal variance between the allegations and the proof.

At the trial of an indictment for arson, the defendant's son testified that, at the fire or soon after, he asked the defendant, "What did you want to set this afire for?" and that the defendant made no reply. The judge instructed the jury that, if the defendant did not hear the question, he was not bound to answer; if he did, the jury would consider whether or not, under the circumstances, he was bound to answer, and how far any inference was to be drawn against him for not answering. *Held*, that the defendant had no ground of exception.

MORTON, C. J. The defendant is indicted under the Gen. Sts. *c.* 161, § 2, which provides that "whoever wilfully and maliciously burns in the night-time a meeting-house, church, court-house, town-house, college, academy, jail, or other building erected for public use, or a banking-house, warehouse, store, manufactory, or mill, of another, (being, with the property therein contained, of the value of one thousand dollars,) . . . . shall be punished by imprisonment in the state prison for life." The indictment charges that the defendant, on October 12, 1881, at Amherst, in the night-time, "feloniously, wilfully and maliciously did burn a certain manufactory, used for the manufacture of fishpoles, the same being, with the property therein contained, of the value of one thousand dollars, of the property of one Charles O. Parmenter."

It appeared at the trial, that the building burned was the property of said Parmenter, and was of the value of $400; that the personal property contained in the building belonged to one Bridgman, excepting property of the value of $40, which belonged to the defendant; and that the property belonging to Bridgman was of the value of $1000. The principal question in the case is whether there was a fatal variance between the allegations and the proof.

The defendant contends that, by its true construction, the indictment alleges not only that the building, but also that the property contained in it, was the property of Parmenter. Assuming this to be so, we are of opinion that the variance is not fatal. The general rule is, that it is sufficient if the substance of the issue is proved. In applying this rule, there is a distinction between allegations of matters of substance and allegations

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of matters of essential description of the offence. Any allegation, which is descriptive of the identity of that which is legally essential to the offence charged in the indictment, must be proved as made. But where a particular fact is made part of an allegation, which is not essentially descriptive of the offence or material to the jurisdiction, a discrepancy between the allegation and proof as to this fact is not a material variance. 1 Greenl. Ev. §§ 56, 65. *Commonwealth* v. *Wellington*, 7 Allen, 299. *United States* v. *Howard*, 3 Sumner, 12.

The indictment before us charges the offence of burning a building, described as the manufactory of Parmenter. It was necessary to allege and prove that the building, with the property contained in it, was of the value of one thousand dollars, in order to show that the offence was of the aggravated degree described in the second section of the statute. Perhaps it was necessary to allege that the property contained in the building was not the property of the defendant.

If so, the allegation that it was the property of Parmenter involves and includes an allegation that it was not the property of the defendant. But the particular allegation that it was the property of Parmenter is not material. It is of no consequence whether it belonged to Parmenter or Bridgman. The substance of the allegation of the indictment is proved by showing that the property contained in the building was of the value of one thousand dollars, being the property of some other person than the defendant. The particular allegation that it was the property of Parmenter is not a part of the essential description of the offence with which the defendant is charged. It does not affect the identity of the offence, but merely shows the grade of the offence. *Devoe* v. *Commonwealth*, 3 Met. 316, 327. To test this, suppose the defendant should be again indicted for burning this building, the indictment alleging that the property therein contained was the property of Bridgman. It is clear that this conviction would be a bar to the indictment. The offence consists in the burning of the building, correctly described in the indictment as the building of Parmenter. Having once been convicted, he could not be again put in jeopardy for the same burning. *Commonwealth* v. *Squire*, 1 Met. 258. We are therefore of opinion that the ruling of the Superior

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Court upon this point, that the defendant might be convicted on the indictment as it stood, was correct.

In the course of the trial, the defendant objected to the testimony of his son, who stated that, at the fire or soon after, he asked the defendant, "What did you want to set this afire for?" and that the defendant made no reply. The court admitted the evidence, instructing the jury that, if the defendant did not hear the question, he was not bound to answer; if he did, the jury would consider whether or not, under the circumstances, he was bound to answer, and how far any inference was to be drawn against him for not answering. The bill of exceptions does not show any error in the ruling of the court. Declarations made in the presence of a party, to which he makes no reply, are sometimes competent, as equivalent to a tacit admission by him. This depends on whether he heard and understood them, whether he is at liberty to reply, whether he is in custody or under any restraint or duress, and whether the statements are made by such persons, and under such circumstances, as naturally to call for a reply. *Commonwealth* v. *Kenney*, 12 Met. 235. *Commonwealth* v. *Harvey*, 1 Gray, 487. *Commonwealth* v. *Galavan*, 9 Allen, 271. In this case, the question was put by the son to the defendant when he was under no restraint or duress; and it was properly left to the jury to decide whether he heard it, and whether it was put to him under such circumstances that, according to human experience, he would naturally reply to it. *Exceptions overruled.*

C. Delano, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* JOHN F. NICHOLS & another.

Bristol. Oct. 24, 1882. — March 1, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

It is no bar to an indictment against A. and B., for conspiracy falsely to accuse the wife of A. of adultery with B., that a divorce was granted to A. from his said wife upon his libel for the cause of adultery with B., to which she set up as a defence the charge of conspiracy contained in the indictment.

An indictment against A. and B. alleged that the defendants, intending to injure the wife of A., and to deprive her of her good name and character, conspired to entrap and ensnare her, and falsely to charge and accuse her of the crime of adultery with B., with the intent to induce her, through fear of being publicly charged with and prosecuted for said crime, to release, against her will, all rights of property and support to which she was and would be entitled as A.'s wife, including a release of all right of dower in A.'s real estate; and with the intent to induce her, against her will, to surrender and release all claims under a certain promissory note made by A. payable to a third person, and by the latter indorsed to her, and held by her as her sole and separate property; and with the intent that A. might wrongfully procure a divorce from her, against her will, for the crime of adultery falsely charged; that, in pursuance of said conspiracy, the defendants plotted that B. should lodge in the dwelling-house occupied by A.'s wife as a residence, and should get in bed alone with her, against her will, and should be found therein with her; and that B. did get in bed alone with A.'s wife, against her will, and was found therein by A. *Held*, that the indictment sufficiently alleged a conspiracy falsely to charge and accuse the wife of A. of adultery, and thereby to extort from her a release of valuable rights, and to compel her to do acts against her will, and was good.

If one count of an indictment charges a conspiracy to commit the crime of extortion by falsely accusing one of the crime of adultery, and another count charges a conspiracy falsely to accuse one of the crime of adultery, if there is evidence to sustain the former count, a general verdict of guilty will not be set aside, although the latter count is insufficient.

INDICTMENT, as follows: "The jurors of the Commonwealth of Massachusetts, on their oath present, that John F. Nichols, of Fall River in the county of Bristol, and Almon Ingalls, of Malden in the county of Middlesex, at Fall River in the county of Bristol, on the thirtieth day of January in the year of our Lord one thousand eight hundred and seventy-eight, wickedly and maliciously devising and intending unjustly, fraudulently and maliciously to deprive one Mary A. C. Nichols of her good name and character, and to subject her without any just cause to the punishment by law prescribed for the crime of adultery, did then and there falsely, unlawfully, wickedly and maliciously

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combine, conspire, confederate and agree together to entrap and ensnare the said Mary A. C. Nichols, and falsely to charge and accuse her of the crime of adultery with the said Almon Ingalls; and that the said John F. Nichols and Almon Ingalls, in pursuance of said agreement, conspiracy, combination and confederacy, did unlawfully plot, contrive and arrange among themselves, at said Fall River, on said thirtieth day of January in the year eighteen hundred and seventy-eight, that said Almon Ingalls should then and there be found by said John F. Nichols in bed alone with the said Mary A. C. Nichols in the night-time in her bed, she, the said Mary A. C. Nichols, being then and there a married woman, and the lawful wife of the said John F. Nichols; and in further pursuance of said agreement, conspiracy, combination and confederacy, the said Almon Ingalls was then and there found by the said John F. Nichols in bed alone with the said Mary A. C. Nichols in the night-time in her bed, she, the said Mary A. C. Nichols, being then and there a married woman, and the lawful wife of the said John F. Nichols: against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, on their oath aforesaid, do further present that John F. Nichols, of Fall River in the county of Bristol, and Almon Ingalls, of Malden in the county of Middlesex, at Fall River in the county of Bristol, on the thirtieth day of January in the year eighteen hundred and seventy-eight, wickedly and maliciously devising and intending unjustly, fraudulently and maliciously to injure one Mary A. C. Nichols, and to deprive her of her good name and character, did then and there, amongst themselves, falsely, unlawfully, wickedly and maliciously combine, conspire, confederate and agree together, falsely, fraudulently and unlawfully to entrap and ensnare the said Mary A. C. Nichols, and falsely, fraudulently and unlawfully to charge and accuse her, the said Mary A. C. Nichols, of the crime of adultery with the said Almon Ingalls, the said Mary A. C. Nichols being then and there a married woman, and the lawful wife of the said John F. Nichols, with the intent then and there, thereby and by the means aforesaid, to induce her, the said Mary A. C. Nichols, through fear of being publicly charged with said crime of adultery, and prosecuted and

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arrested therefor, to release, against her will, all rights of property and support to which she was and would be entitled as the wife of said John F. Nichols, including a release of all claim or right of dower in and to the real estate of the said John F. Nichols; and further, with the intent then and there to induce her, the said Mary A. C. Nichols, through the fear and by the means aforesaid, against her will to surrender, give up and release all claims under or upon a certain promissory note signed by the said John F. Nichols, whereby, for value received, he promised to pay the sum of three thousand dollars, on demand, to one Lafayette Nichols, or order, which note was indorsed by said Lafayette Nichols and delivered to her, the said Mary A. C. Nichols, and was then and there held and possessed by the said Mary A. C. Nichols as her sole and separate property; and further, with the intent then and there, by the means aforesaid, that the said John F. Nichols might unjustly and wrongfully procure a divorce from the bonds of matrimony between him and the said Mary A. C. Nichols, against her will, for the crime of adultery falsely and fraudulently charged. And the jurors aforesaid, on their oath aforesaid, do further present, that in pursuance of said agreement, conspiracy, combination and confederacy, the said John F. Nichols and Almon Ingalls did, at said Fall River, on said thirtieth day of January, plot, contrive and arrange among themselves that the said Almon Ingalls should lodge in the dwelling-house occupied by the said Mary A. C. Nichols as a residence at said Fall River, and that the said Almon Ingalls should then and there, unlawfully and against the will of the said Mary A. C. Nichols and without her consent, get in bed alone with her, and should be so found therein with her; and in further pursuance of said plotting, contriving and arranging amongst themselves, the said Almon Ingalls, on said thirtieth day of January, at said Fall River, in the night-time of said day, did, unlawfully, against the will of the said Mary A. C. Nichols, and without her consent, get into bed alone with her, the said Mary A. C. Nichols, therein, at the dwelling-house aforesaid, and was then and there found in bed alone with her therein by the said John F. Nichols: against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

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"And the jurors aforesaid, on their oath aforesaid, do further present, that John F. Nichols, of Fall River in the county of Bristol, and Almon Ingalls, of Malden in the county of Middlesex, at Fall River in the county of Bristol, on the thirtieth day of January in the year eighteen hundred and seventy-eight, wickedly devising and intending to injure and defraud one Mary A. C. Nichols, and to deprive her of her good name and character, and to subject her without any just cause to the punishment by law prescribed for the crime of adultery, did then and there, amongst themselves, falsely, unlawfully, wickedly and maliciously conspire, combine, confederate and agree together falsely and fraudulently to entrap and ensnare the said Mary A. C. Nichols, and falsely and fraudulently to charge and accuse her, the said Mary A. C. Nichols, of the crime of adultery with the said Almon Ingalls, she, the said Mary A. C. Nichols, being then and there a married woman, and the lawful wife of the said John F. Nichols: against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided."

In the Superior Court, the defendants filed a special plea to the indictment, alleging that the charge of conspiracy contained therein was fully heard and tried in a libel for divorce brought by the defendant Nichols against the said Mary A. C. Nichols for adultery with the defendant Ingalls, the said charge of conspiracy being set up as a defence by her; and that the court granted a divorce to the defendant Nichols. The government demurred to the plea. *Colburn*, J., sustained the demurrer, and overruled the plea; and the defendants excepted. The defendants then filed motions to quash the indictment, which were also overruled against the defendants' exception. The jury returned a verdict of guilty against both defendants; and they alleged exceptions.

E. L. Barney, for Nichols.

H. E. Swasey, for Ingalls.

G. Marston, Attorney General, for the Commonwealth.

W. ALLEN, J. The demurrer to the special plea in bar was properly sustained.

The second count is good. Rejecting all averments not traversable, it sufficiently alleges a conspiracy falsely to charge and

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accuse Mary A. C. Nichols of adultery, and thereby to extort from her a release of valuable rights, and to compel her to do acts against her will. *Commonwealth* v. *O'Brien*, 12 Cush. 84. *Commonwealth* v. *Andrews*, 132 Mass. 263. The motion to quash the indictment was therefore properly overruled.

But the defendants contend that the first and third counts are bad, and should be quashed; and that a general verdict of guilty upon all the counts will not sustain a judgment upon the second count. The general rule is, that, upon a general verdict of guilty upon an indictment containing several counts for the same offence, judgment may be entered on any sufficient count. *Brown* v. *Commonwealth*, 8 Mass. 59. *Josslyn* v. *Commonwealth*, 6 Met. 236. *Commonwealth* v. *Hawkins*, 3 Gray, 463. *Commonwealth* v. *Howe*, 13 Gray, 26.

The real objection relied upon by the defendants is, that, although all the counts refer to the same acts, yet the offence set forth in the second count is not the same as that intended to be charged in the first and third counts, and that the verdict may have been rendered on those counts, and upon evidence which would not sustain a verdict upon the second count, and which did not prove any offence. The objection is equally fatal as applied to one count as to two, and it is unnecessary to inquire whether the first count is sufficient. If it differs, in legal construction, from the third, the difference is not material to the point under consideration. The third count alleges a conspiracy falsely and fraudulently to charge and accuse Mrs. Nichols of the crime of adultery. It contains no allegation of a conspiracy to prosecute her for the crime, or publicly to charge and accuse her, or to injure her in her good name or her property, or in any manner. The defendants contend that a combination privately to accuse a person of a crime, with no intention of injuring him, and no ulterior purpose, is not an indictable offence.

The materiality of this objection depends upon whether the two counts are for the same offence, in the sense that a general verdict could have been rendered upon proof of the third count. If they are not, if the offence charged, or intended to be charged, in the third count is such that proof of it would not sustain a general verdict, but the allegations of the second count

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must have been proved before such a verdict could have been found, judgment can be rendered on the second count, although the third count is insufficient.

The third count charges a conspiracy to do an unlawful act, to accuse one falsely of crime; the second count charges a conspiracy to commit the crime of extortion, by falsely accusing one of crime. These are different offences, and the defendants could not have been convicted of the latter upon proof of the former only, nor without evidence not applicable to it. In *Commonwealth* v. *Andrews*, *ubi supra*, a count alleged a conspiracy to charge with adultery with intent to extort money, and the allegation of the purpose was insufficient. It was argued that that part could be rejected, and the first part stand as a sufficient charge of a conspiracy. The court said, "But this cannot be done; if it were, the defendants would be tried for a conspiracy for a different object from the one presented by the grand jury, that is, they would be tried for a different offence from the one charged."

In the case at bar, the general verdict included a verdict upon the second count, and could not have been found without proof of the purpose therein alleged. If the proof had been only of a conspiracy to accuse of crime, as charged in the third count, the defendants would have been acquitted on the second count. But there could not have been a conviction upon the second count without proof of all that was alleged, and that constituted the offence intended in the third count, and more: and, upon evidence sustaining the second count, a general verdict of guilty would have been the proper and usual form. It is analogous to the case of an indictment containing one count for breaking and entering with intent to steal, and a second count for larceny, where both counts are for the same act. There, upon proof of the larceny only, there must be a verdict upon each count; but upon proof of the breaking and entering and larceny, a general verdict is proper, and it is not vitiated by the fact that the second count is bad. *Crowley* v. *Commonwealth*, 11 Met. 575. See also *Commonwealth* v. *Nickerson*, 5 Allen, 518; *Commonwealth* v. *Fitchburg Railroad*, 120 Mass. 372; *Commonwealth* v. *Andrews*, *ubi supra*; *Commonwealth* v. *Boston & Maine Railroad*, 133 Mass. 383.

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The only exceptions, except that to sustaining the demurrer to the special plea, are to the refusal of the court to quash the indictment. As one count of the indictment is sufficient, the whole ought not to have been quashed, even if the others were insufficient; but we have treated the motions as if to quash the different counts, and given the defendants all the advantage they would have had if the motions had been in that form. We do not decide whether the first and third counts are sufficient, because the verdict finds that the second count was proved, and that includes the two others. No question is before us as to the sufficiency of the evidence to sustain the verdict. *Exceptions overruled.*

COMMONWEALTH *vs.* LOUIS K. PALMER.

Suffolk. March 18, 1881; January 4. — March 2, 1883.

Under the St. of 1867, *c.* 130, § 1, requiring the owner or keeper of a dog to cause it to be registered and licensed for one year "in the office of the clerk of the city or town wherein said dog is kept," and § 5, providing that "a license from the clerk of any city or town shall be valid in any part of the Commonwealth, and may be transferred with the dog licensed, provided said license be recorded by the clerk of the city or town where such dog is kept," if the keeping of a dog is transferred from the city or town in which it is registered and licensed, the license must be recorded in the city or town where, after such transfer, the dog is kept.

If the owner of a dog takes it to a town other than that in which it is registered and licensed, and keeps it there for four months, although he goes there for no definite period and with the intention only of remaining there temporarily for rest and recreation, and leaves his home ready for occupancy upon his return, and comes to the place in which it is situated every day to his business, the dog is "kept" in the town to which it is so taken, within the meaning of the St. of 1867, *c.* 130, §§ 1, 5.

COMPLAINT, under the St. of 1867, *c.* 130, § 5, alleging that the defendant, on August 16, 1880, "did keep and maintain a certain female dog, without said dog being then and there registered and licensed according to law, said dog being then and there a dog more than three months old." Trial in the Superior Court, before *Gardner*, J., who allowed a bill of exceptions, in substance as follows:

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The complainant, a constable of Winthrop, testified that the defendant came to Winthrop some time in June 1880, and in August 1880, was notified by the witness that he must have his dog registered in Winthrop; that the defendant answered that his dog was licensed and registered in Boston, and that was all the law required him to do. The town clerk of Winthrop produced the records of the town, and no license or register of any license for the dog belonging to or kept by the defendant appeared upon the records.

The defendant testified that he was a resident of Boston, and had been for fifteen years, and lived at No. 7 Bulfinch Place; that he went to the police station in May 1880, and had a dog that he kept at his house, registered, numbered, described and licensed; that he paid therefor the sum of five dollars, and received the license. The license was put in evidence, and was admitted to be duly issued for the year from May 1880 to May 1881. The defendant further testified that he placed a collar upon the dog, and produced it, having inscribed upon it the number of the license, the name of the defendant and his place of residence, the number, description and residence being the same as stated in the license; that he went to Winthrop about June 1, 1880, intending to remain temporarily, for rest and recreation, and took the dog with him, leaving his home in Boston ready for his occupancy upon his return; that he took a room and engaged board at a hotel, but for no fixed time; that he had no fixed time determined upon for remaining in Winthrop, but stayed longer than he had any expectation of, and until about October 1, 1880; that the dog remained there, and was brought home to Boston when he came back; that, during the time he was there, he came to Boston every day to his business; and that he did not cause his license to be recorded by the clerk of the town of Winthrop.

The defendant asked the judge to instruct the jury, that if, upon the evidence, they were satisfied that the defendant was a resident of Boston, and went to Winthrop intending to remain temporarily for rest and recreation, and with no fixed time for remaining, taking with him his dog, duly registered and licensed in Boston, he would be protected from fine or forfeiture under the statute.

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The judge refused to instruct the jury as requested, and ruled that a person whose dog was duly licensed in any town or city in the Commonwealth could take his dog into any other city or town in the Commonwealth for temporary purposes, such as for hunting, or to accompany him in travelling from town to town, without having his license recorded in such other town or city; but if such person kept his dog for any substantial length of time in a city or town other than that in which the license was granted, then the license must be recorded by the clerk of such city or town; that if the defendant, having his dog duly licensed in Boston, removed from Boston to Winthrop about June 1, 1880, and there boarded until October 1, and during that time kept his dog there, and did not have his license recorded by the clerk of the town of Winthrop, then the jury would be justified in finding that the dog was kept by the defendant in Winthrop without authority of law; and that, under the statute, the defendant would be liable.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. W. Bartlett, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

FIELD, J. There was evidence that the defendant was a resident of Boston, and had caused his dog to be registered, numbered, described and licensed in Boston for one year from May 1, 1880, and had caused it to wear around its neck a collar distinctly marked with its owner's name and its registered number; and that a license had been duly issued to him by the chief of police of said city. Sts. 1867, *c.* 130, §§ 1, 3; 1871, *c.* 41.

The defendant went to Winthrop about June 1, 1880, for rest and recreation, and took his dog with him, and he remained there, coming however every day to Boston to his business, until about October 1, 1880, when he returned to Boston. While the defendant was living in Winthrop the dog remained there, and the license issued in Boston was not presented for record to the clerk of the town of Winthrop, and was not recorded by him.

The St. of 1864, *c.* 299, § 5, in its last clause, provided that "a license from the clerk of any city or town shall be valid in any part of the Commonwealth, and may be transferred with

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the dog licensed: provided, said license be recorded by the of the city or town where the owner or keeper of such dog sides." The St. of 1867, c. 130, § 5, in its last clause, pro that "a license from the clerk of any city or town shall be in any part of the Commonwealth and may be transferred the dog licensed: provided, said license be recorded by the of the city or town where such dog is kept." This last vision, except that, by the St. of 1871, c. 41, in Boston, the of police was required to perform the duties theretofore im upon the clerk, remained unchanged until the enactment of Pub. Sts. c. 102, § 86, which provide that "a license duly corded shall be valid in any part of the Commonwealth, may be transferred with the dog licensed," but the proviso omitted, as it was omitted in the report of the commissioners on the revision of the statutes. The decision of this case is affected by the Public Statutes. See c. 223, § 5.

By the statutes in force when the acts complained of were committed, the owner or keeper was required to obtain a license to keep a dog from an officer of the city or town where the dog was kept, and this license, if recorded in the city or town where it was issued, was valid for one year from May 1 in any part of the Commonwealth, and might be transferred with the dog licensed, provided it "be recorded by the clerk of the city or town where such dog is kept." This proviso must mean that the license originally granted and recorded *might* be transferred with the dog licensed, provided it were again recorded by the clerk of the city or town where, after such transfer, the dog was kept. In this case there was no transfer of the ownership from one person to another, or of the custody or keeping of the dog from one person to another; but, if the acts of the defendant constituted a keeping of the dog in Winthrop, there was a transfer of the keeping of the dog from Boston to Winthrop. The questions to be decided are, first, whether a transfer of the keeping of a dog from one city or town to another renders it necessary that the license be recorded in the city or town where, after such transfer, the dog is kept; and secondly, whether the evidence warranted the jury in finding that the defendant kept the dog in Winthrop. We think both questions must be answered in the affirmative.

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The St. of 1864, c. 299, § 1, required the owner or keeper of a dog to cause it to be registered, &c., "in the office of the clerk of the city or town wherein he resides." See Gen. Sts. c. 88, § 52; Sts. 1859, c. 225, § 1; 1858, c. 139, § 1. The St. of 1867, c. 130, § 1, required the owner or keeper of a dog to cause it to be registered, &c., "in the office of the clerk of the city or town wherein said dog is kept." Since the passage of this statute, it is the place where the dog is kept, and not the place of residence of the owner or keeper, that determines the town or city where the dog must be registered and licensed. The proviso to the last clause of the St. of 1864, c. 299, § 5, that, in case of a transfer of the license with the dog, the license should "be recorded by the clerk of the city or town where the owner or keeper of such dog resides," was adapted to the provisions of that statute, and contemplated the transfer of the dog to another owner or keeper. That statute intended that there should be a record in the city or town where the owner resided. The change made in this proviso, as it is found in the last clause of the St. of 1867, c. 130, § 5, became necessary by reason of the change in the law which required the license to be recorded in the city or town where the dog was kept, instead of in the city or town where the owner or keeper resided. The transfer contemplated by the last clause of the St. of 1867, c. 130, § 5, was a transfer of the place of keeping the dog from one city or town to another.

There are other provisions of this statute indicating that it was the intention that there should be a record in each city or town of all dogs duly licensed and kept therein. By § 6, the assessors are required to take a list of all dogs owned or kept in their respective cities or towns on the first day of May, with the owners' or keepers' names, and to make returns thereof to the city or town clerk; and by § 7, the mayor of cities and the chairman of the selectmen of towns are required to issue a warrant to one or more police officers or constables, directing them to proceed forthwith either to kill or to cause to be killed all dogs within their respective cities or towns not licensed or collared according to the provisions of the act, and to enter complaint against the owner or keeper thereof. These provisions and others show that it was intended that there should

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be a record in each city or town of all dogs lawfully therein, in order that the authorities might have the means ascertaining the persons who were to be held responsible the damages done by such dogs, and the dogs which it their duty to cause to be killed.

The Legislature intended that only one license for each should be required, but that the license should be recorded each of the different cities and towns where during the the dog was kept.

In considering what constitutes the keeping of a dog in a city or town, it is perhaps unnecessary to attempt to make elaborate statement, which shall be applicable to all cases may arise. The evidence in this case was not sufficient warrant the jury in finding that the defendant had changed domicil or residence to Winthrop. For many purposes, hold that a person must have a domicil somewhere, and can be permitted to escape the responsibilities of a domiciled per by frequent migrations, and that therefore a domicil once to exist must be presumed to continue until a new one is quired. The incidents of domicil, which often involve the bility to taxation, the right to vote, the legal settlement the person, his status and capacity to make contracts or a tament, the law of the distribution of his personal estate, the jurisdiction of courts, are matters of the gravest importance and require that both the intention and the act of permanently changing the abode should be shown before a new domicil established. No such incidents attach to the keeping of a dog. A dog is dangerous where he is, or where he is kept, and not some other place where his owner or keeper may have his legal residence. If the owner of a dog takes it with him to a place which is his home for the time being, where he lives while engaged in the ordinary prosecution of his business, which is not merely a temporary place of stopping when hunting or traveling, we think he may be said to keep his dog there.

In the opinion of a majority of the court, the instructions given were substantially correct, and the

Exceptions are overruled.

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TRUSTEES OF AMHERST COLLEGE *vs.* JOHN M. SMITH & others.

Franklin. Sept. 20, 1882. — April 2, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

If one of several executors of a will, who are also residuary devisees and legatees, is a devisee of a parcel of land on the condition of his paying a certain legacy, and accepts the devise, the giving of a bond by all the executors, conditioned to pay debts and legacies, will not vest in him an absolute title to the land so devised, which he can convey to a *bona fide* purchaser free of the lien for the legacy; and such purchaser cannot maintain a bill in equity to compel the legatee to seek payment of the legacy from the residuary estate, or from the sureties on the bond, before proceeding against the land.

BILL IN EQUITY, against the executors of, and the legatees under, the will of Austin Smith, alleging the following facts: Austin Smith died on September 5, 1871, seised of a tract of pasture land in Conway. He left a will, which was duly proved and allowed, and by which he devised to his son, John M. Smith, one of the defendants, said pasture land, "provided, and it is a condition of this bequest, that the said John M. shall, at the expiration of two years from my decease, pay to my granddaughter Mary B. Smith, daughter of Elihu Smith, the sum of one thousand dollars; and shall also pay to my son, Elihu Smith, the sum of four thousand dollars, to be held by said Elihu in trust, as hereinafter provided." The will also contained the following clause: "To my son, Elihu Smith, I give and bequeath the sum of four thousand dollars, to be paid to him by my son, John M. Smith, at the expiration of three years from my decease; to have and to hold the same until the expiration of eight years from my decease in trust, for the following purposes: the yearly income, until the expiration of the eight years aforesaid, to be divided equally between my said sons, Elihu and John M., and the principal (four thousand dollars) at the expiration of the said eight years, to be paid over in equal portions, share and share alike, to my grandchildren who may be then living, excepting Mary B. Smith, daughter of Elihu Smith, whom I have otherwise provided for. The foregoing legacies to my grandchildren, including that to my granddaughter Mary B. Smith, are subject

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to this condition, that in case any one of my said grandc... shall die before arriving at the age of twenty-one years, t... her portion shall be divided equally among the survivors ... and share alike."

The defendants John M. Smith, N. A. Smith and Elihu S... were made residuary devisees and legatees of the estate of ... testator, and were appointed executors of his will. They ... cepted the trust, qualified as executors, and gave their joint ... several bond, with sureties, to the judge of probate, condit... to pay all the debts and legacies of the testator. John M. en... into possession of the land devised to him, and has ever since ... tinued in the occupation of the same. On July 1, 1874, he m... gaged said land to the plaintiffs, with full covenants of warra... to secure the payment of a sum of money lent to him by ... plaintiffs. The mortgage debt and interest thereon are ... unpaid. The plaintiffs made the loan in good faith, suppos... that the same was rightfully obtained by John M. as such exe... tor and devisee. The defendants have declared to the plaint... that the legacies so charged upon said land have never been p... by John M. to the legatees; that the executors have no funds ... pay the same; and that the defendants intend to enforce t... lien on said land for the legacies, as a lien thereon prior to t... rights of the plaintiffs under their mortgage. The defendants ... other than the executors, have brought a writ of entry against ... the plaintiffs to recover said land, although the plaintiffs have ... never entered and taken actual possession of the land under ... their mortgage. The land is not now of sufficient value to ... satisfy both the defendants' demand for the legacies and the ... plaintiffs' mortgage lien.

The prayer of the bill was that the legatees might be restrained from proceeding against said land for payment of their legacies until they had exhausted their remedies against the assets in the hands of John M. Smith, or their remedy on the probate bond, and for general relief. The defendants demurred for want of equity.

The case was heard on the bill and demurrer, by *W. Allen, J.*, and reserved for the consideration of the full court.

J. C. Hammond & J. I. Cooper, for the plaintiffs.

F. G. Fessenden, for the defendants.

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C. ALLEN, J. If it be assumed, as contended by the plaintiffs, that the sums of $1000 and $4000 directed to be paid to Mary B. Smith and Elihu Smith, trustee, respectively, are to be considered as legacies, which the executors would be bound to pay from the general estate of the testator, in case, for any reason, the same could not be realized from the land devised to John M. Smith, or from John M. Smith personally, still it by no means follows that the giving of the bond by the executors for the payment of all debts and legacies would have the effect to vest in John M. Smith an absolute title to the land, which he could convey to a *bona fide* purchaser, free and clear of the lien for the legacies. Such a bond is a substitute for the estate of the deceased, and conclusively admits assets sufficient to pay all debts and legacies which the executors are bound to pay. But if a testator expressly charges a legacy on a particular piece of land, which is specifically devised subject to the charge, or if he imposes on a particular devisee the personal duty of paying the legacy, as the condition on which he is to take a specific devise of land, in such case the giving of a bond by the executors with condition to pay all debts and legacies will not have the effect to discharge the lien on the land which is created directly by the will itself, or to supersede the duty of the devisee to pay the legacy. It is, at most, but a supplementary obligation and security. The burden and duty will still rest primarily on the estate devised, and on the devisee; and only secondarily on the general estate of the testator, and upon the sureties on the executors' bond. Nor is the case different where such devisee happens to be one of several executors. The burden and duty still rest on him in his capacity as devisee, and upon the particular estate which is devised to him. The liability of the executors as such, if it exists at all, is only secondary. The bond is not a substitute for the particular parcel of land devised, or for the personal duty of the devisee. Such a case is quite different from one where the legacies are payable only from the general estate of the testator, as in *Clarke* v. *Tufts*, 5 Pick. 336, 340.

In the present case, the land devised to John M. Smith on condition of his paying the sums in question became thereby charged with the payment of them. These sums being distinctly mentioned in the will, a purchaser of the land must see that the

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purchase money is applied to their payment. 2 Sugd. Vend. (8th Am. ed.) 658. Lewin on Trusts (7th ed.) 413. 2 Story Eq. Jur. §§ 1127, 1132, 1133. *Andrews* v. *Sparhawk*, 13 Pick. 393. *Goodrich* v. *Proctor*, 1 Gray, 567, 570. *Leavitt* v. *Wooster*, 14 N. H. 550. *Hallett* v. *Hallett*, 2 Paige, 15. John M. Smith was also, by his acceptance of the devise, bound personally for their payment. *Loder* v. *Hatfield*, 71 N. Y. 92. *Birdsall* v. *Hewlett*, 1 Paige, 32. *Harris* v. *Fly*, 7 Paige, 421, 427. *Gardner* v. *Gardner*, 3 Mason, 178, 209. *Sands* v. *Champlin*, 1 Story, 376, 383. *Merrill* v. *Bickford*, 65 Maine, 118. *Corwine* v. *Corwine*, 9 C. E. Green, 579.

At the time the bond was given, the sureties knew, or must be deemed to have known, that the payment of these sums rested primarily on the land, and on the devisee thereof, and that the land could be followed into the hands of a purchaser. They had a right to assume that a purchaser would see to the proper application of the purchase money. So, on the other hand, at the time the plaintiffs took their mortgage, they must be deemed to have been aware of all these facts, and to have understood that the liability of the general estate of the testator, and the obligation of the sureties upon the bond, were at most but supplementary, and that the sureties, if compelled to pay these sums, would be subrogated to the right of the legatees to follow the land.

Under these circumstances, the plaintiffs have no equity to compel the legatees to seek payment from the residuary estate, or from the sureties on the bond, rather than from the land. It is, therefore, unnecessary to consider at all the important question whether these sums could in any event be deemed legacies, in such sense that they would be payable by the executors, and so be covered by the bond, in case the devised land and the personal responsibility of John M. Smith should prove insufficient for their payment. *Bill dismissed.*

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FITCHBURG RAILROAD COMPANY *vs.* NEW HAVEN AND NORTHAMPTON COMPANY.

Franklin. Sept. 19, 1882. — April 6, 1883. FIELD, COLBURN & HOLMES, JJ., absent.

A statute authorized the extension of a railroad, and provided that it should not cross any existing railroads at grade, and that all necessary structures for crossing under grade should be subject to the approval of the railroad commissioners. A plan for the proposed structure by which a railroad was to be crossed was prepared and submitted to the railroad commissioners, and, a hearing being had, was approved by them. After the hearing, and before being notified of the approval, the railroad company whose location was to be crossed extended a siding so as to make a second track at the point of crossing. The other railroad company tore up this siding, and removed the embankment supporting the same. The track of the railroad, as it existed at the time of the hearing, was not disturbed, and the extension of the railroad was constructed under the same, in accordance with the plan proposed to, and approved of by, the commissioners. *Held*, that the railroad company whose location was thus interfered with could not maintain a bill in equity against the other railroad company to restrain it from tearing up the siding and removing the embankment, and to recover damages for such acts.

BILL IN EQUITY to restrain the defendant from entering upon the plaintiff's railroad, tearing up one of the tracks thereof, and excavating and removing the embankment supporting the same; and to recover damages therefor. Hearing before *C. Allen*, J., who reserved the case for the consideration of the full court; such decree to be entered as law and justice might require. The facts appear in the opinion.

G. A. Torrey, for the plaintiff.

H. B. Stevens, for the defendant.

DEVENS, J. The St. of 1880, *c.* 26, authorized the extension of the defendant's railroad, and it was contemplated that the extension proposed would involve a crossing of existing railroads. The statute contained a proviso "that the extensions herein authorized shall not cross any existing railroads, on a grade level therewith, and that all necessary structures for crossing under the grade thereof shall be subject to the approval of the railroad commissioners and shall be constructed at the expense of the New Haven and Northampton Company." A plan for the proposed structure by which the plaintiff's road was to be crossed was prepared and submitted to the railroad

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commissioners; and, a hearing being had, the commissioners, as appears by their record, approved the "plan of the proposed structure for crossing under said branch" (the plaintiff's railroad), "and will approve such structure if upon examination it shall appear to be properly constructed." Of this decision the parties were informed upon the next day; but after the hearing, and before receiving this information, the plaintiff had extended a spur or siding so as to make at the point of crossing a second track. The acts complained of are the tearing up of the siding and the removal of the embankment supporting this second track. The plaintiff's track as it existed at the time of the hearing was not disturbed, and the defendant's road was constructed under the same, in accordance with the plan proposed to, and approved of by, the commissioners.

The power of the State to take for public use the franchise of a corporation, as well as other property, or to subject or devote its property to other or similar public uses, is not disputed. It was clearly competent for the Legislature to authorize the defendant with its road to cross that of the plaintiff, upon such terms as it deemed wise and just.

The plaintiff does not contend that, after the hearing, it could have wantonly covered its location with tracks for the purpose of embarrassing the defendant; but that, as it in good faith extended another track over the portion of its location where the defendant's road was to cross, before it received notice that the commissioners had approved the structure for that purpose which had been proposed, it was the duty of the defendant to obtain the approval by the commissioners of some other appropriate structure by which the second track would be crossed, before it proceeded.

The determination of the commissioners could only be made with reference to the railroad considered as a structure as it existed when their approval was requested. The authority given by the statute to the defendant was an authority to cross the entire location of the plaintiff's railroad, provided the structure for crossing under the grade thereof met the approval of the commissioners. When this was obtained, the right of the defendant to cross, using the structure approved of, was complete. The motives of the plaintiff cannot be important; the

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inquiry is whether it could rightfully change the condition of facts upon which the commissioners had been called upon to decide, so as to deprive the defendant of the benefit of their approval of the structure by which it would be able to cross the plaintiff's road. If it could do this before their decision was announced, it might equally do so after such approval, certainly at any time before the erection of the structure, as approved, commenced. Such cannot, we think, be a correct construction of the rights which the defendant obtained under the statute, and would tend to serious embarrassment. Having complied with all that was necessary to avail itself of the authority given by the statute in order to cross the plaintiff's railroad, it would still be unable to do so, because the plaintiff had seen fit to change the condition of affairs. In such case, it would be for the plaintiff to apply to the commissioners for a revision of their order of approval, which should cause the structure for the crossing to be adapted to such changed condition. This not being done, the defendant might act upon the approval already given, and cross the plaintiff's road by the structure which it contemplated.

When under the Gen. Sts. *c.* 63, §§ 48–62, and the St. of 1865, *c.* 239, county commissioners have acted in the regulation of railroad crossings over highways, which is a matter within their jurisdiction, their record ordering in what manner the crossing shall be constructed is conclusive in an action at law upon all parties. *Brewer* v. *Boston, Clinton & Fitchburg Railroad*, 113 Mass. 52. In like manner, the record of the railroad commissioners approving the manner in which one railroad is to cross another, by its approval of the structure therefor, under a statute which authorizes the crossing upon such approval, should be conclusive, so long as it remains unmodified or unreversed. *Bill dismissed.*

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SARAH A. McIVER & another *vs.* ARTHUR E. ESTABROOK & another.

Worcester. Oct. 4, 1882. — April 3, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A tenant at will of a lessee of land erected a small building on the land resting on stone posts sunk into the ground. The building was erected with the knowledge and consent of the lessor of the land, and with an understanding on his part, and on that of the tenant at will, that it could be removed as a trade fixture. Both tenancies expired at the same time, and neither tenant removed the building; the lessor resumed possession of the land, and soon afterwards the former tenant at will hired it with other land at an increased rent. *Held*, that the tenant at will could not, after this, remove the building, or maintain replevin for it, on the refusal of the owner of the land to allow its removal.

REPLEVIN of a building. Trial in the Superior Court, without a jury, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

In 1862, James Estabrook, senior, the father of the defendants, and Arthur E. Estabrook, one of the defendants, were the owners of an estate, consisting of a tract of land, with a large building between four hundred and five hundred feet long, used for manufacturing purposes, and occupied by various persons, to whom the Estabrooks rented rooms and power. In 1862, Richardson, Merriam & Company hired of them room in said building with power, which they occupied for manufacturing purposes, and became tenants at will. Among the occupants of said building, at that time, was the firm of E. C. Cleveland & Company, who were also tenants at will, and who continued so until 1864, when they took a lease in writing of the entire establishment, excepting such buildings on the premises as had been erected by and belonged to the other tenants, to run from January 1, 1865, to January 1, 1870; and, after that time, the various tenants of the establishment attorned to Cleveland & Company, and paid their rent to them until the failure of Cleveland & Company, which occurred in October 1869. No notice was given to the tenants of the intention to make this lease before it was executed and delivered.

Richardson, Merriam & Company knew of the existence of the lease after it took effect; and, during the existence of the

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lease, Richardson, Merriam & Company hired of Cleveland & Company some additional room, which they continued to occupy until the expiration of the lease. During the continuance of the lease, the Estabrooks built an addition to said shop seventy-eight feet long, and for that purpose took a lease in writing from Cleveland & Company of the land upon which the same was built, at the nominal rent of one dollar.

At the expiration of the lease, the Estabrooks resumed control of the premises; and, shortly after, Richardson, Merriam & Company hired of the Estabrooks a portion of the room they were occupying, including the land on which the building was, and some additional room in the new part, at an increased rent agreed upon between the parties, and continued their occupation thereof uninterruptedly until October 28, 1876, when, they having failed in business, receivers were appointed by the Supreme Judicial Court, upon the application of one of their creditors, and, by a decree of said court, were directed to take possession of their property, convert the same into money, and hold and dispose of the same as the court might thereafter direct. After the receivers were appointed, proceedings in bankruptcy were instituted against Richardson, Merriam & Company, and by direction of the court the proceeds of the sale of their property were paid over to their assignees in bankruptcy, and distributed among their creditors, among whom were the defendants, whose demand amounted to over $5000.

After the receivers were appointed, they caused an inventory and an appraisal of all the property of Richardson, Merriam & Company in and about their shop to be taken, including the building in question, and on February 17, 1877, the plaintiffs bought the entire property described in the inventory (including said building) from the receivers at an agreed price of $10,000, and took a parol lease of the defendants of the real estate which had been occupied by Richardson, Merriam & Company under a new contract, at different rent, together with all the privileges and appurtenances enjoyed by said Richardson, Merriam & Company.

In 1874 James Estabrook, senior, deceased, and the defendant James E. Estabrook became an owner in common with the other defendant by inheritance of the premises.

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Before the plaintiffs bought the property of the receivers, and while they were negotiating for its purchase, they hired of the defendants the premises as aforesaid, and succeeded to the business of Richardson, Merriam & Company, which they carried on as long as they continued in the occupation of said premises.

Between October 28, 1876, and February 17, 1877, Richardson, Merriam & Company continued in the occupation of said premises, carrying on their business to a limited extent; and on February 17, 1877, the plaintiffs entered into the occupation thereof, and continued uninterruptedly in such occupation until February 20, 1881. During that period several changes were made by agreement between the parties in the amount to be paid for the rent, which was payable, and paid, quarterly.

On July 1, 1880, the plaintiffs and the defendants not being able to agree with reference to the rent (the defendants having made demand for increased rent), the defendants gave the plaintiffs a notice to determine their tenancy, and on January 3, 1881, the defendants caused the shafting which communicated power to the plaintiffs' machinery to be uncoupled; whereupon the plaintiffs and the defendants made a special agreement as to the rent for one month, and, at the end of that time, they made another agreement for the rent to run until February 20, 1881. The plaintiffs paid their rent when due during all the time they remained in the premises.

Between 1862 and February 17, 1877, Richardson, Merriam & Company were all the time in constant occupation of the premises hired by them, and the plaintiffs were in constant occupation of the premises hired by them until February 20, 1881, when they surrendered them to the defendants.

In 1866, Richardson, Merriam & Company erected the building in question at a cost of $700, upon land adjoining the shop, for an office and storehouse. It was a building fifteen by thirty feet, resting upon stone posts sunk into the ground, and intended by them to be used in connection with their business for an office and storeroom, and was so used by them during all the time of their occupation, and also by the plaintiffs during the time of their occupation. Richardson, Merriam & Company, and the plaintiffs during all the time of their occupation, were tenants at will of the different persons before named.

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On February 8, 1881, the plaintiffs, in contemplation of surrendering the premises, attempted to remove the building, but were forcibly prevented from so doing by the defendants, whereupon they brought this action.

Nothing was said, at the time when any of the changes in the rent or the occupation of the premises were made, with reference to the building by any of the parties. The building was erected with the knowledge and consent of the Estabrooks, and with an understanding and belief on their part that it could be removed as a trade fixture. Richardson, Merriam & Company also erected the building with that understanding, and between that time and February 8, 1881, the Estabrooks never exercised any acts of ownership or control over it, or claimed it to be their property, otherwise than as may be inferred from their leasing it as aforesaid.

Upon these facts, the plaintiff asked the judge to rule, as matter of law, that the right to the building and the right to remove it continued in the plaintiffs up to the time of bringing the suit. The judge declined so to rule, and found for the defendants; and the plaintiffs alleged exceptions.

F. A. Gaskill, for the plaintiffs.

F. P. Goulding, for the defendants.

W. ALLEN, J. Richardson, Merriam & Company, being tenants at will of Cleveland & Company, who were tenants for years of the Estabrooks, erected the building in question. The building, unless affected by some special act or agreement of the parties, was a fixture which the tenant had a right to remove at or before the end of his term. It became, when erected, a part of the realty, subject to the right of the tenant to sever it from the realty and convert it into personalty. If the tenancy at will should end before the estate for years, and the tenant at will had not removed the fixture, it would remain as part of the demised premises, with the right in the tenant for years to remove it during his term. In this case, the tenancies at will and for years determined at the same time, and neither tenant removed the building. The Estabrooks resumed possession of the premises, and soon afterwards leased at will to Richardson, Merriam & Company a portion of the premises they had held under Cleveland & Company, including the land on

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which the building stood, and the building, and some additional room, at an increased rent. We infer from the exceptions, though it is not expressly stated, that, after the termination of the lease for years, and until the lease just mentioned, Richardson, Merriam & Company occupied, as tenants at will of the Estabrooks, the premises they had before hired of Cleveland & Company. The plaintiffs subsequently purchased the right of Richardson, Merriam & Company, and the defendants represent the Estabrooks. There have been changes in the tenancies which it is not necessary to consider, as, if the status of the building as real estate was fixed by the transactions referred to, nothing has occurred since which can change it. That it was so fixed, unless affected by some agreement of the parties, is plain from the case of *Watriss* v. *Cambridge National Bank*, 124 Mass. 571. The exceptions state that "the building was erected with the knowledge and consent of the Estabrooks, and with the understanding and belief on their part that it could be removed as a trade fixture. Richardson, Merriam & Company also erected the building with that understanding." The plaintiffs rely upon this as showing some agreement or consent of the parties, which will take the case out of the rule of *Watriss* v. *Cambridge National Bank*. But we do not see that this evidence changes the character of the erection. The fact that a landlord knows and assents to the erection of a fixture by a tenant, can afford no inference that he agreed that it should not be a fixture.

It is argued that Richardson, Merriam & Company were strangers to the Estabrooks, and that the consent given cannot be taken as consent by a landlord to a tenant. But they were tenants claiming under the Estabrooks, and holding an estate granted by their lease to Cleveland & Company, and the legal inference would be that the erection was made by them as tenants, and that the Estabrooks knew and consented to such erection. But, without regard to the relations of the parties, the consent of a landowner that a building to be erected on his land shall be personal property cannot be inferred from his consent to the erection of a building which he and the person erecting it both understand shall belong to the realty.

Exceptions overruled.

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MICHAEL MATTHEWS *vs.* INHABITANTS OF WESTBOROUGH.

Worcester. Oct. 4, 5, 1882. — April 3, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action by A. against a town to recover a sum voted by the town to him as compensation for injuries received by him while in the employ of the town, the plaintiff put in evidence the records of the town, from which it appeared that, at a regular town meeting, under an article in the warrant to see if the town would grant aid to A. for injuries received while in the employ of the town, the matter was referred to the selectmen to inquire into the facts and report to the town what they considered would be a fair compensation to A. for his injuries, in addition to what he has already received from the town; that, at a subsequent town meeting, the selectmen reported the facts of the plaintiff's injuries, and that "the town would do well" to pay him a sum named by them; and that, when the report came up for consideration, it was amended by inserting a larger sum instead of that named, and, as amended, it was adopted. The judge instructed the jury, among other things, that the validity of the town's action depended upon whether the money was voted as a gratuity, or was voted as a settlement of a claim against the town, which had been made or might reasonably be expected to be made, founded upon an alleged legal liability; that if there was no legal liability, but the plaintiff made a claim under such circumstances as to indicate that it was not a mere pretence, but was a real claim founded upon an alleged legal liability, and that claim was made known to the committee, and their report was made in reference to it, the vote was valid; that if the town was legally liable, and no claim was made of any legal liability, and upon the facts of the case no such claim could reasonably be expected to be made, and the plaintiff asked aid because he was poor and deserving of favor, the money was voted as a gratuity, and the town was not liable. *Held*, that the vote of the town was so far equivocal that parol evidence was admissible in its interpretation. *Held, also*, that the plaintiff had no ground of exception to the instructions given.

In an action against a town to recover a sum voted by the town to the plaintiff as compensation for injuries received by him while in the employ of the town, evidence of a conversation between the plaintiff and his attending physician, in which the plaintiff asserted that he had a legal claim against the town, and the physician expressed to him his opinion that he had such a claim, is inadmissible.

CONTRACT to recover $500, alleged to have been voted to the plaintiff by the defendant town. After the former decision, reported 131 Mass. 521, the case was tried in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff testified that he was employed in 1877 by the defendant town, under the direction of the highway surveyor, who was a duly elected officer of the town, in the excavation

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of a gravel bank for the purpose of obtaining gravel for the repair of the highways of the town; that, while so engaged, the bank caved in, and a large amount of earth and stone fell upon him and injured him; that the place was dangerous; that he knew that such a place was dangerous to work in when he went to work for the town; that he had worked several years digging in gravel banks; that in December 1877, after the accident, he saw the selectmen, and made claim upon the town, and asked for aid or compensation for his injuries, and said he was a poor man and that he had a claim against the town; that Dr. Curtis, one of the selectmen, told him that the selectmen could do nothing for him; that he asked them to put an article in the warrant for the next town meeting, and the selectmen agreed to put an article in the warrant for the annual town meeting, to bring the matter before the town; that when the selectmen met as a committee, under the vote hereinafter mentioned referring the matter to them, he met them by appointment, and they asked how he was situated as to property, and said nothing about his claim, except to ask him if he thought the town was liable, to which he replied that he did; that he did not know what they were going to report, and did not state the amount of his claim to them; that Dr. Curtis, one of the selectmen, had helped set his leg and had attended him afterward with Dr. Harvey, who was his attending physician; that he was at both town meetings at which the matter was voted on; that after the April town meeting he went to the selectmen, and they would not pay him, and said some one objected; and that he, at this and other interviews, accepted the action of the town, and offered to take the amount voted in satisfaction of his injuries.

It was admitted that the meetings of the town at which action was taken relative to the plaintiff were duly warned and legally held.

The plaintiff also introduced the following evidence: The warrant for the town meeting held March 4, 1878, contained the following article: "To see if the town will grant aid to Michael Matthews for injuries received while in the employ of the town." On this it was voted "that the subject matter of this article be referred to the selectmen, with instructions to inquire into the facts and report to the town what they consider

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would be a fair compensation to Mr. Matthews for his injuries, in addition to what he has already received from the town." The selectmen took the matter into consideration, and at a town meeting held April 15, 1878, made the following report: "The selectmen having been chosen a committee at the annual March meeting to examine into and report upon the case of Michael Matthews, submit the following: We find upon examination that Michael Matthews while in the employment of the town upon the public highway, in June 1877, was injured by the falling of an earth embankment; the main and only injury received was a fracture of the thigh-bone near the joint, in consequence of which he has been subjected to much pain and expense, together with a loss of time, nearly nine months. In view of the above statement we are of the opinion that the town would do well to pay said Matthews $144 in addition to $56 already paid him, making in all $200, and so recommend." The report coming up for consideration at said town meeting, the report was amended by inserting the sum of $500 instead of $200, and as amended the report was adopted.

The plaintiff testified that two or three persons spoke at the town meeting.

The plaintiff objected to the introduction of any parol evidence by the defendant, contending that its liability was absolute under the votes; but the judge ruled that said report and votes were so far equivocal as to admit of parol evidence to aid in the interpretation of them, and permitted the defendant to introduce the following evidence, against the plaintiff's objection:

H. W. Weld testified that he was surveyor of highways in the defendant town, in 1877; that he cautioned the plaintiff the day before the accident not to dig under the bank so as to incur risk of its coming down; that he cautioned the plaintiff several times before about digging under such banks, and cited as an instance a different bank from that where the accident happened, but similar to it and composed of similar material; that he paid Mathews $56, by direction of the selectmen, as the other workmen were paid, and kept his name on the list of workmen for six weeks, when his gang ceased work.

Moses Bombat testified that he was at work with the plaintiff at the time of the accident; that he told the plaintiff the day

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before and on the morning of the accident that he was picking under the bank too far; and that at the time of the accident the plaintiff was engaged in picking under the bank.

W. R. Gould testified that he was one of the selectmen in 1877; that the plaintiff came to him as such, and said he thought the town ought to do something to aid him in his expenses and sickness; that he had been a resident of the town for many years, and had paid taxes; that he told the plaintiff "we had already given him $56 without any authority;" that he claimed that as a reason why the town should do more; that at the meeting of the selectmen before the March meeting the plaintiff came before them and made a request, similar to that which he had made before, that the town should assist him; that "we told him that we had no authority, but would put it in the warrant and let the town do as they saw fit;" that, after the March meeting, the selectmen met him and questioned him about his circumstances; thought they told him they would make it up to $200; that he never asked for compensation, and never said he had a claim on the town; that he was at the town meeting in April, and one Bowes made a motion to raise the amount; that no one else made any remarks; that Bowes, in supporting his motion, said that the plaintiff was a respectable man, a good citizen, and it was easier for the town to pay than for him to get along without it. On cross-examination, the witness testified that he knew that the town could not legally vote a gratuity.

Dr. Curtis testified to the same effect as Gould; and further testified that the plaintiff, in his conversations with the selectmen prior to the March town meeting, said that it was a dangerous place where the town put him to work; that, both prior to and after the town meeting, he instanced the case of a man in Worcester who had recovered of the city for injuries resulting from the caving in of a sewer, and he thought his case was like that; that Bowes, at the April meeting, thought the selectmen had not reported enough for the injuries which the plaintiff suffered.

Reuben Boynton testified that Bowes in the town meeting said the selectmen had not reported enough for what the plaintiff was injured.

The selectmen were the only persons to whom the plaintiff made application as agents or representatives of the town.

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This was all the evidence in the case, except certain other testimony tending to show that all his applications to the selectmen for money from the town were made as for a gratuity, and not for compensation.

The plaintiff called as a witness the physician who attended him in his illness, who testified that, upon two occasions, one during the plaintiff's confinement to his bed and one a few days before the March meeting, he had a conversation with the plaintiff, and offered to show that, in the course of these conversations, the plaintiff contended that he had a legal claim against the town, and that the witness expressed to him his opinion that he had such a claim. This evidence was excluded by the judge, and the plaintiff excepted.

At the close of the evidence, the plaintiff asked the judge to direct a verdict for the plaintiff, on the ground that there was no evidence sufficient to warrant the jury in finding that the vote of the defendant town was illegal. The judge refused so to do; and, among other things not excepted to, instructed the jury, in substance, as follows:

"The material question for you to decide in this case is as to the validity of the vote of the town. The right of towns to appropriate by vote the money of their inhabitants is created and defined by statute. A town cannot lawfully vote money to be given in charity, but it can lawfully and properly provide by vote for the payment of its debts and for the settlement of claims against it. [In this case, the validity of the town's action depends upon whether the money was voted to the plaintiff as a gratuity, on account of the misfortune which had come upon him in the service of the town, and because he was thought worthy and deserving of favor, or was voted as a settlement of a claim against the town, which had been made or might reasonably be expected to be made, founded upon an alleged legal liability for the accident which happened to the plaintiff.] If it was voted as a gratuity, the town is not liable. If it was voted as a settlement of such a claim, the town is liable. This involves the determination of what was the intent and purpose of the town in passing the vote. This intent is the corporate intent, — the intent and purpose of the town acting as a municipality, — a single corporate being, and not the intent of any particular

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person, or of any number of persons who make up the corporation. This intent can be ascertained only by the language of the vote. Parol evidence would not be competent to show what was actually in the mind of any inhabitant of the town who participated in this vote. In construing the vote, the article in the warrant bringing the matter before the town, the vote under it appointing a committee, the report made to the town by this committee, and the amendment and final adoption of the report by the town, must all be considered together. What is the true interpretation and meaning of a vote of a town is not a question for a jury where no facts are in dispute, but is a question of law for the court. The language is always to be interpreted with reference to the subject matter to which it relates, and the circumstances under which it is used.

"In this case, the facts proper to be considered in the interpretation of the vote are in dispute, and so its true intent and meaning are to be ascertained by you in the application of it to the facts as you shall find them. Accordingly, evidence has been introduced of what the accident was, and how it happened, and you may consider this evidence with a view to determining whether the town was legally liable to the plaintiff for the injury which he suffered. The town was not liable for the injury, unless the accident happened on account of the negligence of the town while the plaintiff was in the exercise of ordinary care. In entering into the service of the defendant, he assumed all the ordinary risks incident to his employment, and all risks of accidents happening through the fault or negligence of his fellow-workmen. If the danger of working in this bank in the way he was doing at the time of the accident, or the danger of so working in other similar banks, was brought to his attention before the accident, that fact is proper to be considered upon the question whether he was at the time of the accident in the exercise of due care. If he knew that what he was doing was dangerous, and determined to take the risk of it, he was not in the exercise of such care as would enable him to recover for the injury.

"You may also consider what occurred at the town meeting at which the vote was passed, what representations were there made about the case, and what reasons were there urged by

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speakers in support of the motion to adopt the report. These matters will be material and important in helping you to ascertain the meaning of the vote.

"To further aid you I will give you the following rules: 1. If the town was legally liable for the accident, the vote must be deemed to have been intended as a settlement of the claim. 2. If there was no legal liability for the accident, but the plaintiff made a claim under such circumstances as to indicate that it was not a mere pretence, but was a real claim founded upon an alleged legal liability of the town for the accident, and that claim was made known to the committee that made the report, and the report was made with reference to it, the vote must be deemed to have been intended as a settlement of it, and is valid. 3. If the town was not legally liable for the accident to the plaintiff, and no claim was made of any legal liability of the town therefor, and upon the facts of the case no such claim could reasonably be expected to be made, and the plaintiff asked aid because of his misfortune and because he was poor and worthy and deserving of favor, and these latter were the reasons urged in his behalf in the speeches at the meeting at which the vote was passed, the money was voted as a gratuity, and it cannot be collected of the town.

"I do not undertake to lay down rules for every possible view that you may take of the evidence, but from these rules, and from any others that may be properly applicable to the facts as you may find them, you will determine the true meaning and interpretation of the vote. If, in accordance with the principles of law which I have stated, you find the vote valid, your verdict will be for the plaintiff; if you find it was not valid, it will be for the defendant."

The plaintiff excepted to that portion of the charge which is enclosed in brackets, and also to the second and third of the three rules given to the jury for their guidance.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

F. A. Gaskill, for the plaintiff.

W. S. B. Hopkins, for the defendant.

W. ALLEN, J. The court properly ruled that the vote of the town adopting the report of the selectmen, with an amendment,

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was so far equivocal as to admit of parol evidence to aid in its interpretation. *Matthews* v. *Westborough*, 131 Mass. 521.

The plaintiff objects specifically to two matters put in evidence, amongst other things, under this ruling. We do not understand that any ruling was made, or exception taken, except as to the competency of parol evidence to aid in construing the vote. If the plaintiff wished to except to any particular evidence as not falling within this ruling, he should have made objection to it on that ground.

The evidence offered by the plaintiff of a conversation between himself and his physician was properly excluded.

We find no error in the instructions to the jury. It is objected that the court left it to the jury to determine whether the defendant was legally liable to the plaintiff. But this was only under the instruction that, if the town was legally liable, "the vote must be deemed to have been intended as a settlement of the claim." Leaving the question to the jury under such instructions was sufficiently favorable to the plaintiff. It was only in case the jury failed to find that the defendant was legally liable, that any question of the right of the plaintiff to recover could arise.

The jury were instructed, in effect, that, if the money was voted as a gratuity, the plaintiff could not recover; if it was voted as a settlement of a claim,—a claim which had been made, or which might reasonably be expected to be made,—the town would be liable. The plaintiff objects to the second rule given by the court to the jury, that it required the jury to find for the defendant unless a claim had in fact been made by the plaintiff. We do not so understand it. The jury had been instructed sufficiently. This instruction was only that, if certain facts, which the plaintiff claimed to be proved, were true, the vote was valid. It was limited to one aspect of the case presented by the plaintiff, and was favorable to him, and we see no ground on which he can object to it.

If the defendant was not legally liable, and the plaintiff did not contend, and could not reasonably be expected to contend, that it was liable, and if the plaintiff asked for a gratuity, and the vote was advocated in the town meeting as a gratuity,—if all these facts were proved, the vote must be construed as

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for a gratuity. This was in substance the instruction in the third rule given to the jury. The plaintiff objects to this, among other reasons, that there may have been other facts consistent with these, which, added to them, would call for a different construction of the vote. Perhaps such facts can be imagined, but none were disclosed in the evidence, and the rule of construction laid down by the court must be applicable to the evidence. It is objected that what was said in town meeting was not competent to construe the vote, and that the instruction is erroneous in including that. The evidence upon this point was only of what was said by the person who made the motion. We are inclined to think that it was competent. But if it is excluded, the other facts fully warrant the instruction. The instruction required that the jury should find all the facts stated in it; and the jury, finding a verdict under this instruction, must have found that there was no legal liability of the town, that the plaintiff made no claim of legal liability, and the facts were such that no claim could reasonably be expected to be made, and that the plaintiff asked for a gratuity. Upon these facts being established, there being no facts in the case to control their effect, it was the duty of the court to construe the vote as for a gratuity. *Exceptions overruled.*

CHARLES FLOYD *vs.* RICHARD SUGDEN.

Worcester. Oct. 6, 1882. — April 3, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

If a person employed to dig a trench is injured by the caving in of the sides of the trench, his employer is not liable to an action for such injury, if he furnished the materials for sheathing or shoring up the sides of the trench, and the materials were not used for that purpose by the person employed by him to superintend the digging of the trench.

TORT for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration alleged that the injuries were caused by the negligence of the defendant, "in not supplying suitable, safe and sufficient machinery, appliances, tools and implements for the safe performance of the work upon

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which the plaintiff was engaged." Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

On September 25, 1879, the defendant purchased a mill property in East Brookfield. The premises were out of repair, and the defendant hired one Gilman to take the entire charge of them, to make any and all repairs that in Gilman's judgment might be necessary to put the premises into a proper condition for use or for sale. Gilman, in accordance with the instructions of the defendant, assumed the entire control of the premises, collecting the rents, selecting, hiring and discharging the employees, purchasing and providing whatever tools, appliances and machinery he deemed necessary, and paying all bills, including the wages of the employees, with money furnished for that purpose by the defendant, who withdrew entirely from the management of the repairs, and did not undertake to exercise any discretion or control over the acts of Gilman or the employees. Gilman acted as agent for the defendant from sixty to eighty days, and was paid $175 for his services.

The water for furnishing the power was conducted to the mill from a mill-pond through a penstock or wooden canal, made in a cylindrical form and buried in the ground. This penstock had existed about twenty-five years. The penstock being decayed, Gilman set the plaintiff and others at work to uncover the earth from a portion of it for the purpose of making necessary repairs. The men excavated a trench over the penstock about eighteen feet long, from nine to twelve feet deep, from ten to twelve feet wide at the top, and from seven to nine feet wide at the bottom; and, while working on the bottom of the trench and on the top of the penstock, the penstock gave way and the sides of the trench caved in upon the plaintiff, and he received the injuries complained of.

It appeared that the trench was dug in very sandy soil, and there was evidence tending to show that the sides of the trench ought to have been sheathed or shored up with planks, and these planks secured in their places by cross braces; that there ought to have been a small platform made to extend across the penstock to the earth on each side, for the men to stand upon while at work; and that if such appliances, or either of said classes of

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appliances, had been used, the accident could not have happened. No sheathing or shoring, or platform of any kind or description, was used or furnished as a completed structure to be used in the trench.

The defendant and Gilman both testified that they did not furnish any planks or materials for the purpose of protecting the men, but there was a conflict of testimony whether there were any planks or materials on the premises suitable and proper to be so used. There was evidence tending to show that there was an abundance of materials, suitable for the purpose, belonging to the defendant, within a few rods of the place of the accident, and that the defendant intended that such materials should be used for any purpose for which they might be needed.

The plaintiff asked the judge to rule as follows: "1. The terms 'machinery,' 'appliances,' 'tools' and 'implements' include all the implements of every kind used in or about the business, and in this case would extend to sheathing or shoring, and to the platform contended by the plaintiff to be necessary. 2. If the defendant withdrew from the management of the work and entrusted to Gilman the entire charge of it, exercising no discretion and no oversight, then the defendant is liable for the neglect by Gilman to cause the trench to be shored up, and to construct a platform in the bottom of the trench over the penstock for the plaintiff to stand upon, if in the exercise of reasonable care such appliances were necessary for the safe performance of the service."

The judge declined to give either of the instructions asked for in the form in which they were requested, but gave the first with the insertion of the words "materials for" between the words "to" and "sheathing," and the substitution of the word "for" for "to" before the words "the platform." The judge refused to give the second instruction requested; and instructed the jury that the defendant was bound to furnish suitable machinery, tools, implements and appliances for carrying on the work in which the plaintiff was engaged; that he could not relieve himself from this obligation by delegating the business to an agent or employee; that if the injury to the plaintiff resulted from any neglect to furnish and provide suitable and proper machinery, tools, implements and appliances, whether

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the defendant undertook to attend to it personally or left it to Gilman, he was liable; and that the terms "machinery," "tools," "implements" and "appliances" would not include a line of sheathing or planking set in position in the ditch, or a platform constructed in the excavation over the penstock for the men to stand upon while working, but would include everything required for the proper construction thereof, if sheathing, planking, or a platform were reasonably necessary or proper for the safe and proper performance of the work.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. W. King, for the plaintiff.

W. A. Gile, for the defendant.

W. ALLEN, J. The declaration, in alleging that the defendant was negligent "in not supplying suitable, safe and sufficient machinery, appliances, tools and implements for the safe performance of the work upon which the plaintiff was engaged" correctly expresses the ground of the defendant's liability. The negligence of which the plaintiff complains consisted in not properly protecting the sides and bottom of the excavation in which he was at work. If the defendant furnished the materials, the appliances, for doing this, the use and application of them, according to the exigencies of the work, was the duty of servants engaged in the work, unless specially assumed by the master. Gilman, as superintendent of the work, and the plaintiff, as a laborer upon the work, were fellow servants, and the duty of Gilman in using the means and appliances provided for safely and properly carrying on the work was that of a servant engaged in the same business with the plaintiff, even if he had acted as the representative of the master in furnishing such means and appliances. There was no error in the instructions or refusals to instruct. *Albro* v. *Agawam Canal*, 6 Cush. 75. *McDermott* v. *Boston*, 133 Mass. 349. *Flynn* v. *Salem*, *ante*, 351. *Holden* v. *Fitchburg Railroad*, 129 Mass. 268, and cases cited. *Exceptions overruled.*

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FREDERICK G. BUXTON *vs.* WILLIAM EDWARDS & others.

Worcester. Oct. 3, 1882. — April 4, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

In an action on a debt due from a partnership, to which the defence is payment by a promissory note of the successors in business of the old firm, the plaintiff may put in evidence what was said when the note was given; and, if it appears that he has offered proof of the note against the insolvent estate of the new firm and has withdrawn the proof, evidence is competent, on the issue whether he had knowledge or notice of the dissolution of the old firm, that he supposed when he proved the note that it was the old firm that had gone into insolvency.

A partnership debt is taken out of the operation of the statute of limitations by a part payment thereof made by one partner within six years, although the firm had then been dissolved by the voluntary act of the partners, if the holder of the debt had no knowledge of the dissolution.

If a person having a claim against a partnership takes in payment a promissory note of the successors of the firm, without knowledge that the old firm had been dissolved, and supposing that the note was that of the old firm, he may maintain an action on the debt, without showing that he was fraudulently induced to take the note.

An accounting together is not the creation of a new debt, but is a statement and acknowledgment of an old debt, from which a promise to pay is implied sufficient to maintain an action.

One partner, after the dissolution of a partnership, has authority to adjust a claim upon the firm; and if the partner and the creditor account together, the presumption is that an account stated states the debt of the firm; and this presumption is not rebutted by evidence that the creditor had notice of the dissolution of the partnership.

CONTRACT, against William Edwards, Stephen K. Edwards and Frank Edwards. The writ described the defendants as "late copartners as Wm. Edwards & Sons." The declaration contained three counts. The first count was on a promissory note, dated July 1, 1879, for $3217, payable to the order of the plaintiff, on demand, after date, with interest at the rate of seven per cent per annum, alleged to be signed "Wm. Edwards & Sons." The second count was for money had and received, according to an account annexed, the first item of which was as follows: "1879, July 1. To amount found due from the defendants to the plaintiff, and to be paid over, but retained at that date in their hands, $3217." The second item was for interest. The third count was as follows: "And the plaintiff says the defendants owe him $3217, for balance found due to

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the plaintiff by the parties on accounting together, on July 1, 1879, with interest thereon." All the counts were alleged to be for the same cause of action.

The answer of William Edwards, who alone defended, contained a general denial to all the counts, denied the genuineness of the signature to the note, and that he was ever a member of the firm of Wm. Edwards & Sons; and set up the statute of limitations as to the cause of action in the second and third counts; alleged that, if he was ever indebted, it was upon a note dated July 1, 1873, and such note was paid by a note dated July 1, 1879, signed by the other defendants. Trial in the Superior Court before *Knowlton*, J., who allowed a bill of exceptions, which, after stating that the pleadings might be referred to, was in substance as follows:

The plaintiff was the son of Orren A. Buxton, who acted for him and was his agent in all the transactions hereinafter referred to.

Stephen K. Edwards and Frank Edwards were sons of William Edwards; and the evidence tended to show that, in 1865, William and Stephen K. formed a copartnership to carry on business in Southbridge under the name of Wm. Edwards & Son, and kept a store there, selling various kinds of merchandise in that firm name until the spring of 1873, when Frank Edwards joined them as a copartner, and their firm became Wm. Edwards & Sons; that said firm was dissolved by mutual consent on January 1, 1875, and was succeeded in the same business by a new firm, in which Stephen K. and Frank were the only members, under the name of Wm. Edwards Sons; that on July 1, 1873, the firm of Wm. Edwards & Sons was indebted to Orren A. Buxton in different sums, which, with the interest upon them, amounted in the aggregate to $2432.55, for which amount said firm gave their note payable, with interest at eight per cent, to the plaintiff; that payments were made upon that note as follows: August 15, 1876, $40; March 3, 1877, $210; October 30, 1878, $75; October 9, 1879, $200; that all these payments were made with their own check and moneys by the firm of Wm. Edwards Sons, and that they were the only payments ever made thereon; that, in December 1879, Frank Edwards computed the amount due upon said note up to July 1,

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1879, reckoning interest in annual rests upon the principal, and also upon the payments which had been made upon it, part of the interest being reckoned at seven per cent and part at eight per cent, in accordance with an agreement made with Orren A. Buxton; and the same day Stephen K. Edwards signed the note in suit for the amount so ascertained, dating it back to July 1, 1879, and delivered it to Orren A. Buxton for the plaintiff; that the former note was taken by Stephen K. Edwards, part of the signature was torn off, and it has been kept by him since. The defendants testified that William Edwards had no knowledge of this transaction, or of the making of the payments upon the former note.

It was in dispute between the parties whether the signature upon the note in suit was "Wm. Edwards & Sons" or "Wm. Edwards Sons." There was a curved line or loop after the word "Edwards," which was continuous with the lines of the letter "S" in the word "Sons," which the plaintiff contended was the character "&" and the defendant contended was a part of the letter "S." It appeared that William Edwards was not present at the time this note was made and delivered.

Orren A. Buxton was asked by the plaintiff's counsel, "What was said at the time the note was delivered?" The defendant objected, but the witness was allowed to answer, against such objection, in substance as follows: "We had an accounting in 1879 about that note (meaning the note of 1873). At the time of that accounting, I had no idea of a dissolution of the firm of Wm. Edwards & Sons. Frank Edwards was there at the store, and I asked him if he knew how long that note had run that I held against him. He said he did not know. I said I thought it had run about six years, and that it ought to be looked after. I took it out and we figured it up. Stephen said eight per cent was rather too much for the whole time, and I said, 'Call it eight per cent for two years and seven per cent for the balance.' Frank said, 'You had better have a new note.' I said I guessed we had. Stephen said we had, but they could not afford to pay but seven per cent. Frank wrote it. I think Stephen signed it, but am not certain." In response to another question the witness said, "I know the signature of Wm. Edwards & Sons; I have had it times enough, I ought to know it."

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Being shown the signature upon the note in suit, he said, "I should think this was their signature." Having said, "There was no talk whose note it was," he was asked, "Whose note did you receive it as?" and was allowed to answer, against the defendant's objection, "I took it as the note of Wm. Edwards & Sons. It is the signature of that firm; I never knew anything different."

On May 30, 1878, Orren A. Buxton, in a letter addressed upon the outside to Stephen Edwards & Co. and upon the inside to Mr. Edwards, sent a draft for $275, requesting a note for the same, and Wm. Edwards Sons sent him their note, dated May 22, 1878, therefor, by letter. Buxton testified that he supposed that was the note of Wm. Edwards & Sons.

In the fall of 1880, the firm of Wm. Edwards Sons went into insolvency; and, at the solicitation of Stephen K. Edwards, the plaintiff signed and made oath to a certificate in the usual form for the proof in the insolvency court of the note in suit, and Orren A. Buxton signed and swore to a like certificate for the proof of his note of $275; and both said claims were proved and allowed. Both these affidavits for proof were prepared by the attorney of Stephen K. Edwards, and there was evidence that Orren A. Buxton was consulted about it before the plaintiff's proof was made, that he was present when it was made, and that the plaintiff did not read it over or hear it read. It was not shown that William Edwards was present, nor was it contended that any deceit was practised upon or false representations made to the plaintiff, or the said Orren A. Buxton, to procure said proofs. In the direct examination, Orren A. Buxton testified, without objection, regarding the proof of the plaintiff's claim in insolvency and some of the attending circumstances, but the affidavit for proof was not formally put in evidence.

The defendant's counsel, in connection with the cross-examination of Buxton, put in evidence the proof in insolvency, made at or about the same time, of his note for $275, above named, and cross-examined him about it. In reëxamination the plaintiff's counsel put in evidence, without objection, the affidavit upon which the plaintiff's claim was proved, and asked the witness, "Who did you understand had then gone into insolvency?" The defendant objected, but the witness was allowed

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to answer, "I understood it was Wm. Edwards & Sons." The plaintiff was afterward called as a witness, and was allowed, against the defendant's objection, to answer the same question in the same way.

It appeared that the plaintiff, acting under the advice of his counsel, on April 5, 1881, upon his petition to the insolvency court, was permitted to withdraw his said proof against Wm. Edwards Sons, but it did not appear whether any objection was made thereto.

There was no evidence offered to show that, at the time the note in suit was made, Frank Edwards or Stephen K. Edwards did any act or made any statements or representations calculated to deceive; and the plaintiff did not contend that any fraud was practised upon him in connection with the making or delivery thereof.

There was evidence that the firm of Wm. Edwards & Sons published notice of the dissolution of their firm for three weeks successively in the Southbridge Journal, the plaintiff and his father living in North Brookfield at the time; and that the firm of Wm. Edwards Sons, for a long time afterward, published in said paper an advertisement of their business, and procured and used printed billheads and letter-paper with printed headings showing the firm name and the names of the copartners, and that they marked their bags with their firm name, and that letters were written to the plaintiff's agent, Orren A. Buxton, upon said printed letter-paper, and that he received a note and some checks signed with their firm name; and this and other evidence tended to show that Orren A. Buxton had actual knowledge of the dissolution of said firm at the time the note declared on was made, and, prior to December 1879, was in possession of such documents, checks, letters sent to him, and other facts, as would reasonably put him upon inquiry regarding such dissolution, and of such information derived from the documents, letters, checks, and other facts, that, as a man of reasonable intelligence and understanding, he ought to have known that such dissolution had taken place; but there was no evidence that any documents, letters or checks were sent to the plaintiff, or his agent, as notices, or for the purpose of giving notice, of the dissolution of said firm, or that any of them contained words of express

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notification or information of such dissolution, unless the signature "Wm. Edwards Sons" to letters and checks, and the printed letter-heads of Wm. Edwards Sons with the printed names of the two sons as members of the firm, can be so considered.

The plaintiff introduced evidence tending to show that he had no knowledge of the dissolution of the firm of Wm. Edwards & Sons at the time the note declared on was made, and that he and his father, Orren A. Buxton, believed said firm continued in existence until some weeks after the failure of Wm. Edwards Sons, in the fall of 1880.

The defendant requested the judge to instruct the jury as follows: "1. If the jury are satisfied that the firm of Wm. Edwards & Sons was dissolved on January 1, 1875, by mutual consent, and that a new firm was formed composed of Frank Edwards and Stephen K. Edwards, who subsequently carried on the business under the firm name of Wm. Edwards Sons, and no payment was made upon the note dated July 1, 1873, previous to January 1, 1875, and that all payments after January 1, 1875, on said note or on account of the debt represented by it, were made by said new firm of Wm. Edwards Sons, on account of said new firm, then the note dated July 1, 1873, and the debt represented by it, would be barred by the statute of limitations, and the plaintiff cannot recover thereon against the defendant William Edwards. 2. No payment upon the note dated July 1, 1873, or on account of the debt represented by such note, made by said S. K. Edwards and Frank Edwards, either separately or jointly as members of the new firm of Wm. Edwards Sons, to the plaintiff or his agent, after the plaintiff or his agent in the transaction had notice of such dissolution of the firm of Wm. Edwards & Sons, would operate to take the claim out of the operation of the statute of limitations as against William Edwards, or entitle the plaintiff to recover as against him on the note, or upon the debt or claim in any other form. 3. If the jury find that the note in suit is the note of Wm. Edwards Sons, and S. K. Edwards and Frank Edwards gave it as their note, and the plaintiff accepted it in payment of the note of July 1, 1873, he cannot recover now as against William Edwards, upon the counts contained in the amended declaration, although he supposed it to be the note of Wm. Edwards & Sons, if the jury

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find that no fraud was practised upon him at the time said note was given. And fraud must be proved; it cannot be presumed; and in this case the burden of proof is upon the plaintiff, who charges it, to satisfy the jury that some act was done at the time the note was signed, or some deception practised with the intent to mislead or deceive, that did in fact deceive or mislead the plaintiff. The mere mistake of the plaintiff or his agent in his knowledge as to what persons were bound by the signature which he obtained to the note when it was signed, or his mere supposition that William Edwards was bound by it, would not be sufficient to prove fraud, unless the jury find that S. K. and Frank Edwards at the time intended to mislead and deceive, and in pursuance of such intent did some act or made some statement which did in fact mislead and deceive him. The plaintiff must adduce stronger proof to establish fraud than would be required to prove the signing of the note or the existence of a debt; the presumption that persons act honestly and without fraud is so strong, that when fraud is charged the proof must be not only sufficient to establish an innocent act, but to overcome this presumption of honesty also. 4. If the plaintiff or his agent met S. K. Edwards and Frank Edwards, and agreed with them as to the amount due upon the note of July 1, 1873, and S. K. and Frank agreed to pay the same, the plaintiff cannot recover upon that contract against William Edwards, if the jury find that the firm of Wm. Edwards & Sons was dissolved on January 1, 1875, although the plaintiff did not know of such dissolution. 5. If the plaintiff or his agent knew of the dissolution of the firm of Wm. Edwards & Sons before the note in suit was given, or if he or his agent was in possession of such facts that he or said agent ought to have known of such dissolution, by the exercise of reasonable diligence, and those facts were such as to put him upon inquiry, then he cannot recover upon either count of his declaration against William Edwards. 6. If the plaintiff or his agent knew, when the note in suit was made, that the firm of Wm. Edwards & Sons had been dissolved, and that William Edwards was no longer carrying on business with the other defendants, and, having such knowledge, dealt with the other defendants aforesaid, then William Edwards would not be liable on either count of the declaration. 7. Upon the question of

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notice of the dissolution of the firm of Wm. Edwards & Sons, it is not necessary, to bind the plaintiff, to show that he or his agent was told that such firm had been dissolved, or that he saw the published notice thereof; but if he or his agent was in the possession of such documents, checks, letters and other facts as to reasonably put him upon inquiry, and he failed to make such inquiry or investigation as a reasonable man would make under such circumstances, and negligently failed to make such inquiry or investigation, he cannot now avail himself of the position that he had no notice of the dissolution. If, under the circumstances above stated, he or his agent failed to make inquiry or investigation, he cannot now avail himself of the position that he had no notice of the dissolution. Nor is it necessary to show that he or his agent in fact knew the terms of the dissolution contract, and who was authorized to settle the affairs of the firm of Wm. Edwards & Sons, if he or his agent knew that such dissolution had taken place in fact, or if, having taken place in fact, he or his agent was in possession of such information derived from the documents, letters, checks and other facts, that, as a man of reasonable intelligence and understanding, he ought to have known that such dissolution had taken place. It is enough if it is shown that he or his agent actually knew, or should have known, for the reasons stated above, the fact simply of the dissolution, if one was in fact made, without stating the terms thereof. (Upon the question of notice, the dealings of the plaintiff or his agent with S. K. and Frank Edwards, the letters, receipts, checks, and their contents and statements, as well as the evidence of the witnesses as to conversations had with the plaintiff's father, are competent evidence to be considered by the jury, if he was acting as the agent of the plaintiff.) If the jury find that the documents, letters and checks sent the plaintiff or his agent were of such a character as to lead a person of ordinary intelligence and understanding to suppose and believe that a change had taken place in the name of the parties actually carrying on the business formerly carried on by Wm. Edwards & Sons, and that William Edwards was no longer interested therein, and that previous to giving the note in suit, that would be notice such as would prevent the plaintiff from recovering in this action against William Edwards.

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8. Upon the question of payment, the fact that the plaintiff or his agent surrendered the note of July 1, 1873, to the defendants, and that the same was given up and cancelled, is competent proof of payment."

The judge gave the second, sixth and eighth instructions requested, and so much of the seventh as is enclosed in parentheses, and declined to give any of the others in the form in which they were presented, and gave no equivalent ones except as hereinafter stated, and, among other things, instructed the jury that upon the first count the plaintiff could not recover, unless they found that the signature upon the note was the real and genuine signature of the firm of "Wm. Edwards & Sons" and not the signature of Wm. Edwards Sons; that, if they so found, they would consider the question of the dissolution of the firm; and, after giving the jury the general rule that constructive notice of dissolution terminates the liability of a member of a firm as to persons dealing with another member of it, if they had never dealt with it before, said that a different rule prevailed as to those who had formerly been dealers with it; and that, in this case, inasmuch as no question was made but that the plaintiff was a former dealer with the firm of Wm. Edwards & Sons, if they found that firm had been dissolved before the making of the note declared on, they would inquire whether he had actual notice or actual knowledge of such dissolution, either personally or through Orren A. Buxton, his agent; that, if he had such notice or knowledge that said firm had been dissolved, he could not recover, otherwise he could; that, in determining the question, they would consider as evidence all the letters, receipts, checks, documents and other things tending to show notice or knowledge, and that from this evidence they might properly infer knowledge; and that upon this question they might properly presume that known facts and trustworthy information produced upon his mind such effects as they ordinarily produce in like cases upon the minds of persons of common intelligence.

As to the second and third counts, the jury were instructed, among other things, that if the note on which suit was brought bore a signature which resembled the genuine signature of Wm. Edwards & Sons to such a degree that it might properly be read

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as that signature, and that a person of ordinary skill and experience in reading manuscript, familiar with that signature, would be likely to take it for that, and if the plaintiff received the note in the mistaken belief that it was signed in the firm name of Wm. Edwards & Sons, when it was in fact the note of Wm. Edwards Sons, and he never received or had held it as the note of Wm. Edwards Sons, such receipt of the note by the plaintiff would not be a payment of the debt due him; that, if the plaintiff did not receive the note under such a mistake of facts as to leave his former debt unpaid, he could not recover; that if he did receive it under such a mistake, they would inquire further what that debt was; that if the occurrence relied on by the plaintiff constituted a single transaction made up of the giving up of the old note and the delivery of a new one, such a mistake would leave the old note unpaid, and the plaintiff's remedy would be upon that, and he could not recover in this action, but if those occurrences constituted two separate transactions, first the reckoning up of the amount due upon the old note and giving that up, and the creating a new form of indebtedness and afterward the giving of a new note for that indebtedness in its new form, if through mistake such new note was not payment, the plaintiff could go back to the indebtedness in that new form, if in that case the plaintiff dealt with the parties as members of the old firm of Wm. Edwards & Sons and had no actual notice or actual knowledge that said firm had been dissolved, he could recover; that if said firm had been dissolved, and the plaintiff had such notice or knowledge of it, he was bound to know that these two persons had no right to receive the old note and fix an amount which should create a new kind of obligation for money had and received, or upon an accounting together; and that the transaction, so far as it created a new liability, was binding only upon the two who participated in it, and he could not recover against William Edwards; that, in determining whether he had such notice or knowledge, the same rules applied upon this branch of the case as upon the other.

The judge submitted to the jury the following questions: 1. Is the signature appended to the note in suit that of Wm. Edwards & Sons? 2. Did the plaintiff at the time the note in

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suit was made have actual notice or actual knowledge, either personally or through his agent, that the firm of Wm. Edwards & Sons had been dissolved?

The jury answered each question in the negative; and returned a verdict for the plaintiff for $3579.76 against all the defendants.

To the admission of testimony against the defendant's objection, and to the refusal of the judge to give the instructions requested, the defendant alleged exceptions.

A. J. Bartholomew & F. T. Blackmer, for William Edwards.

W. S. B. Hopkins, (*J. M. Cochran* with him,) for the plaintiff.

W. ALLEN, J. 1. The first count, and the exceptions relating to it, are disposed of by the verdict.

2. The evidence given by the plaintiff's agent, in relation to the giving of the note in suit, was clearly competent.

3. The testimony of the plaintiff, that he understood that it was Wm. Edwards & Sons who had gone into insolvency, was competent, in connection with the evidence that he had proved claims against the insolvent estate, as bearing upon the question whether he had notice or knowledge of the dissolution of the firm of Wm. Edwards & Sons.

4. The first prayer for instructions, to the effect that no payment on the note of Wm. Edwards & Sons, made by Wm. Edwards Sons after the dissolution of the former firm, would take it out of the operation of the statute of limitations as to William Edwards, was properly refused. If the plaintiff had no notice of the dissolution of the former firm, the effect of the payment as to him was as if there had been no dissolution. *Sage* v. *Ensign*, 2 Allen, 245. He was not affected by any arrangement as to the payment which may have been made between the partners.

5. The third instruction asked was properly refused. If the plaintiff took the note by mistake, it was not necessary for him to show that he was induced to take it by fraud.

6. The other exceptions relate to the right of the plaintiff to recover on the common counts of his declaration. There are two such counts, one for money had and received, and one upon an account stated. It is assumed that the plaintiff held a valid note of the defendants as composing the firm of Wm. Edwards & Sons, upon which he could maintain an action against them, and

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that he cannot recover upon that note on the count for money had and received, whether because the note is not specified in the bill of particulars or for other reasons, is immaterial. The questions arise upon the other count. It is assumed also that the transaction in December 1879 is sufficient to show such an accounting as will sustain an action on an account stated. There is no exception upon this point, and it seems clear that when the payee of a promissory note, upon which several payments have been made, presents it to the maker, and at his request agrees to remit a proportion of the interest, and the parties compute the amount due upon that basis, and fix upon the sum so found as the amount to be taken as due upon the note, it is such an accounting together as will sustain the action.

An accounting together is not the creation of a new debt. It is a new statement and acknowledgment of an old debt, from which a promise to pay is implied sufficient to maintain an action, but not to discharge the old debt, or to bar an action upon it in its original form. There may be an express promise, which will supersede that which is implied, and which will discharge the original debt. In the case at bar, the note which was given at the time having been avoided, there was no evidence of any express promise, and the action upon the account stated must be sustained, if at all, upon the promise implied from the accounting. We understand the instructions upon this point asked by the defendant and refused by the court, as well as the instructions given, to refer, not to any supposed express promise not disclosed in the exceptions, but to such implied promise; and the precise question to which they relate is, whether that was the promise of all the defendants, as the firm of Wm. Edwards & Sons, or of a part of them as Wm. Edwards Sons.

The fourth prayer for instructions seems to have been framed on the assumption that there was evidence that the agreement was that of Wm. Edwards Sons, and, if that assumption is correct, the instruction should have been given. The contract of one party will not sustain an action against another. If there was no evidence of a contract with Wm. Edwards Sons, the instruction ought not to have been given, and the instructions given were sufficiently favorable to the defendant. As the only promise is that which is implied from adjusting, computing and agreeing

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upon the amount due on the note, which constitute the accounting together, and as the promise implied can be only that of the party accounting, the question may be stated in another form. Was the firm of Wm. Edwards & Sons, or the firm of Wm. Edwards Sons, the party to the accounting? In this connection the fifth and seventh prayers for instructions may be referred to. The jury were instructed that, if the plaintiff had actual notice or knowledge of the dissolution of the firm of Wm. Edwards & Sons, he could not recover, and the jury expressly found that he did not have such notice or knowledge. The defendant, in these prayers, asked for instructions, in effect, that, if the plaintiff had reason to know that the firm was dissolved, he could not recover.

To both of these exceptions, — that to the refusal to instruct that the plaintiff could not recover against Wm. Edwards & Sons on a contract with Wm. Edwards Sons, and that to the refusal to instruct that reason to know was sufficient knowledge of the dissolution, — the same answer may be given: that the presumption was that the accounting, and the promise implied from it, were by the debtor, the firm of Wm. Edwards & Sons, and that constructive knowledge by the plaintiff of the dissolution of the copartnership would not change that presumption. The act was one that one partner has a right to do after dissolution. It is an adjustment and admission of an existing indebtedness for which the firm is liable, in making which each partner, after dissolution, is authorized to act for the others; and in stating an account of a debt of the firm he must be presumed to be acting for the joint debtors; the agreement relates to a subsisting debt of the copartnership, and is an admission that the stated sum is due thereon from the copartnership, and the promise to pay, which is implied, is that of the copartnership. The presumption, even in accounting with a party who has notice of the dissolution, is that it is done for the copartnership, or is the act of all the copartners. There is nothing in the case at bar to rebut that presumption, and these prayers for instructions were properly refused. *Vinal* v. *Burrill*, 16 Pick. 401. *Gay* v. *Bowen*, 8 Met. 100. *Cady* v. *Shepherd*, 11 Pick. 400. *Bridge* v. *Gray*, 14 Pick. 55. *Ide* v. *Ingraham*, 5 Gray, 106.

Exceptions overruled.

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JOHN C. ALLEN, administrator, *vs.* LEOMINSTER SAVINGS BANK & another.

Worcester. Jan. 9. — April 4, 1883. FIELD & W. ALLEN, JJ., absent.

A. mortgaged a parcel of land to B., and subsequently mortgaged the same land to C. by a deed which was signed and sealed by B. as well as by A., but B.'s name did not appear in the deed except in the *in testimonium* clause, as "mortgagee named in a mortgage on said premises, for the purpose of discharging said mortgage." This deed was acknowledged by A. but not by B., and was recorded. No reference was made on the margin of the record of the first mortgage to the second. After this B. died, and his administrator assigned the first mortgage to D., who purchased it in good faith and for a valuable consideration. C. and D. then foreclosed their mortgages. *Held*, that D. could not maintain a writ of entry against C. to obtain possession of the land.

WRIT OF ENTRY, dated May 20, 1882, by the administrator of Asa Pierce, against the Leominster Savings Bank and John B. Allen, to recover a parcel of land in Leominster. The case was submitted to the Superior Court, and, after judgment for the tenants, to this court, on appeal, on agreed facts, in substance as follows:

On May 27, 1870, the tenant Allen executed a mortgage, in the usual form, of the demanded premises, with other real estate, to Nancy Conant.

On October 10, 1870, the tenant Allen executed a mortgage of the demanded premises to the tenant bank. The deed contained a covenant that the premises were free from all incumbrances, and was in the usual form except the *in testimonium* clause, which was as follows: "In witness whereof we, the said John B. Allen and Louise E. Allen, his wife (and Nancy Conant, mortgagee named in a mortgage on said premises, for the purpose of discharging said mortgage so far as the premises hereby conveyed are concerned), said wife in token of her release of all right and title of or to both dower and homestead in the granted premises, have hereunto set our hands and seals this tenth day of October in the year of our Lord eighteen hundred and seventy." This deed was signed and sealed by Allen and his wife, and by Conant. It was acknowledged by Allen alone, and was duly recorded. Conant's name nowhere appeared in this mortgage, except in the *in testimonium* clause.

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She signed the deed without consideration, and did not release her interest in the demanded premises, unless such is the effect of her signature to the mortgage to the bank.

On February 2, 1875, the administrators of Conant's estate assigned the first mortgage to Asa Pierce, who paid full consideration for it. Neither the administrators of Conant nor Pierce then knew of the fact that Conant had signed the mortgage to the bank; and no reference was made on the margin of the record of the first mortgage in the registry of deeds to the second mortgage.

On March 25, 1881, the demandant, as administrator of Pierce's estate, entered upon the premises for a breach of the conditions of the mortgage and for the purpose of foreclosure, and a certificate of such entry was duly recorded in the registry of deeds. The mortgage note is still unpaid.

On May 8, 1882, the bank entered upon the demanded premises for a breach of the conditions of its mortgage and for the purpose of foreclosure, and a certificate of such entry was duly recorded in the registry of deeds. John B. Allen now occupies the premises as a tenant of the bank.

Demand was duly made upon both tenants, before the date of the writ.

If, upon the foregoing facts, the demandant was entitled to possession of the premises, judgment was to be entered for him; otherwise, judgment for the tenants.

H. Mayo, for the demandant, cited *Stearns* v. *Swift*, 8 Pick. 532, 536.

Tenants, *pro se.*

DEVENS, J. The statutes of the Commonwealth provide two ways by which a mortgage may be discharged; namely, by an entry acknowledging satisfaction thereof, made on the margin of the record of the mortgage in the registry of deeds and signed by the mortgagee, and also by a deed of release duly acknowledged and recorded. Gen. Sts. *c.* 89, § 30. Pub. Sts. *c.* 120, § 24.

When the mortgagee joined in a conveyance of the mortgaged premises, for the purpose of discharging the mortgage, although her name was not in the granting clause, she in effect released the premises from the incumbrance which the mortgage had theretofore been upon them, so far at least as the savings

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bank was concerned. The words are not to be construed as the mere declaration of a purpose, but constituted an act, when her hand and seal were affixed thereto, by which her purpose was accomplished.

It is said that there is no grantee in this discharge, but the intent of that which was done was that the savings bank, which was named in the granting portion of the deed, should secure a good title, and the bank must be held to be the grantee, if any be necessary. We are not prepared to say that any is necessary. The deed of release referred to in the statute, like the entry of satisfaction upon the record, is a mode of discharging the mortgage, intended to operate for the benefit of any one who may possess the title to the real estate upon which it is an incumbrance.

Nor is the effect different if it be held that this discharge would operate only as an estoppel. It is an estoppel that binds her and those who claim under her.

As the signature of the mortgagee discharged the premises conveyed from the mortgage, the acknowledgment of one of the grantors was sufficient. *Pidge* v. *Tyler*, 4 Mass. 541. *Shaw* v. *Poor*, 6 Pick. 86. *Judgment affirmed.*

HENRY L. ALDRICH *vs.* ELLIS L. BLAKE & others.

Worcester. Oct. 9, 1882. — April 6, 1883. C. ALLEN, COLBURN & HOLMES, JJ., absent.

A. gave a mortgage of real estate to B. and C. to secure them against liability as sureties on a promissory note of even date given by A. to a bank for money lent. It contained a power of sale upon default for breach of the condition, included in which was the payment of the note by the principal to the holder, which power was to be exercised by the mortgagees or the survivor or the executor or administrator of the survivor of them. Afterwards, A., who occupied the mortgaged premises, executed a quitclaim deed of the same to B. and C., who gave a bond to reconvey them, within a time named, upon certain terms and conditions. The quitclaim deed was recorded, but the bond was not, and A. never complied with its terms. The mortgage when made was delivered to the bank, in pursuance of the original agreement between the parties, and was recorded; the loan was then made to A., and the mortgage has since remained in the custody

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of the bank. Sales, with warranty, of portions of the mortgaged premises were subsequently made, some of which were assented to by the bank after they were made, and others were previously authorized by the bank, payment of sums satisfactory in amount upon the mortgage being made in all cases, and receipts therefor given by the bank. One half of the amount then due on the note was afterwards paid to the bank by the administrator of C., who survived B., upon the agreement that it was to be "in full payment of claim on said note, provided the balance due on the note be paid by estate of B., or by any one for said estate or for themselves." Such balance was not paid to the bank. A creditor of the residuary devisee of B. filed a bill in equity to have the mortgage declared of no validity and to restrain the administrator of C. from selling the mortgaged premises to satisfy the balance claimed to be due the bank upon the note. C.'s administrator, the residuary devisee of B. and the bank filed a cross bill, asserting the existence of the debt to the bank, the validity of the mortgage, and the right of C.'s administrator to sell the real estate to satisfy the debt still due the bank and to reimburse the sureties for the sums paid by them. It was found as a fact, that, when the quitclaim deed was made by A. to B. and C., it was not intended by the parties to operate as a merger of the mortgage title. *Held*, that the original bill should be dismissed; and that the cross bill could be maintained.

DEVENS, J. This is a bill in equity, filed by a creditor of Allen F. Ballou, the latter being the executor and residuary devisee of Otis D. Ballou. The plaintiff levied an execution on a portion of certain real estate conveyed in mortgage to Otis D. Ballou and Warren J. Ballou by Elias S. Ballou, and seeks to have this mortgage declared of no force and validity, and to restrain the defendant Ellis L. Blake, who is the administrator of the estate of Warren J. Ballou, from selling the real estate to satisfy the balance claimed to be due to the Woonsocket Savings Bank upon a note held by it, on which Otis D. and Warren J. Ballou were sureties, and on which the estate of Warren J. is still liable.

The cross bill, which is filed by the bank, Ellis L. Blake, administrator, and Allen F. Ballou, asserts the present existence of this debt, the validity of the mortgage referred to, and the right of Blake, as administrator, to sell the real estate conveyed, to satisfy so much of the debt as is still due to the bank, and to reimburse the sureties for the sums paid by them heretofore.

On June 18, 1866, Elias S. Ballou executed a mortgage to Otis D. and Warren J. Ballou to secure them as sureties on his note, of the same date, to the bank for $25,000, and also to secure any future advances which the mortgagees might make. It contained a power of sale, upon default, for breach of the condition,

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included in which was the payment of the note by the principal to the holder thereof, which power was to be exercised by the mortgagees or the survivor, or the executor or administrator of the survivor of them. As administrator of the surety who survived his co-surety, Blake claims the right to execute the power for the benefit of those beneficially interested under the mortgage, and in order that the estate represented by him may, as between it and the estate of Otis D. Ballou, not be compelled to pay more than its share of the amount due upon the note. The decision as to each bill depends upon the determination of the questions whether the mortgage is held to have been extinguished by reason of the fact that it was merged in the title which Otis D. and Warren J. Ballou obtained under a quitclaim deed subsequently made to them of the premises conveyed by it; and further, whether the note given by Otis D. and Warren J., as sureties for Elias S. Ballou, is to be treated as having been paid and satisfied. In connection with these inquiries, the rights which the bank had in this mortgage security are necessarily to be considered. The levy made by the plaintiff is found to have been by a sale of a portion only of the estate described in the mortgage and covered thereby, and could give no title if the mortgage then legally existed. *Cochran* v. *Goodell*, 131 Mass. 464.

On December 9, 1871, Elias S., who then and for several years thereafter occupied the premises, executed a quitclaim deed of them to Otis D. and Warren J., who gave a bond to reconvey the same within two years upon certain terms and conditions. While the quitclaim deed was recorded, the bond was not, and with its terms Elias S. never complied. Without deciding whether there could have been a merger of titles in view of the bond to reconvey given in 1871, and therefore whether the whole estate, legal and equitable, could be treated as vested in the grantee, merger is not allowed in equity except to promote the actual or presumed intention of the party possessing the two titles. Such intention is often a question of fact, and will not be presumed where it is against the interest of the party. It is found, as a fact, that Otis D. and Warren J. had no intention of merging the title which they held by virtue of the mortgage and that which they obtained by the quitclaim deed.

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As between themselves, it was certainly not for their interest that the merger should take place. If their title became absolute and the mortgage was thus destroyed, while each would remain liable for the whole debt, he would be deprived of the full security which the entire property afforded for its payment, as the interest of his co-surety in the real estate might be appropriated by his other creditors. Again, whatever would be the effect of this transaction, were Otis D. and Warren J. the only ones interested in the mortgage, the rights which the bank had therein were such that they could not have merged in another title taken without the assent of the bank, so as to deprive it of the benefit it was entitled to receive therefrom. The mortgage when made was delivered to the bank, in pursuance of the original agreement between the parties, and the loan of $25,000 was then made to Elias S., and the mortgage has ever since remained in the custody of the bank, and been kept on its file of mortgages. The bank was the equitable assignee of the mortgage, which was intended to secure the payment of its debt by indemnifying the sureties. *Strong* v. *Jackson*, 123 Mass. 60. *Morris* v. *Bacon*, 123 Mass. 58.

When so definite and important an interest had been created in the mortgage in favor of the bank, there could be no union of titles which could operate to exclude it by the act of the mortgagor and mortgagees, or their assigns. There was a trust created in its favor as the payee of the note, which was imposed upon the sureties Otis D. and Warren J. Ballou, and they held the mortgaged property subject to this trust. It being clearly expressed in the mortgage, when this was recorded, constructive notice of its existence was given to all, so that attaching creditors, even if they found that there had been a subsequent quitclaim deed of the granted premises to the mortgagees, would be fully informed that they would of necessity hold them subject thereto. A mortgage made by a principal to a surety, to secure the payment of a note, is not to be regarded in equity simply as an indemnity to the surety. It is not important whether it is in form to pay the debt or to indemnify the surety. Where its object is to provide for the payment of debts, or to enable the surety to do so, he is constituted a trustee for the creditors whose debts are enumerated in the condition. An equitable

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lien is created in their favor, which is attached to the property in the hands of the mortgagee, which would follow it in the hands of his assignee with notice of the trust, and would also bind it in the hands of the original mortgagor or his assignee with notice of the trust. *Eastman* v. *Foster*, 8 Met. 19. *Rice* v. *Dewey*, 13 Gray, 47. *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175. *Prout* v. *Root*, 116 Mass. 410. *Rindge* v. *Sandford*, 117 Mass. 460.

It is suggested that certain sales, with warranty, of portions of the mortgaged premises were assented to by the bank, and that therefore it is estopped from denying a merger. Some of these sales were assented to after they were made, and in others permission was given to transfer and sell certain portions of the mortgaged property. These various acts of assent were all accompanied by payment of sums satisfactory in amount upon the mortgage, and the forms in which the receipts thereof are expressed show that the existence of the mortgage was fully asserted as between the bank and the mortgagees. It cannot be of importance to it that the mortgagees, in making their deeds, state their title as being in them by virtue of the deed of Elias S. Ballou. The acts and assertions of the bank constantly maintained its right under and by virtue of the mortgage, which was in its hands.

We proceed to consider whether the note has been satisfied and paid. One half of the amount then due was paid in 1879 by the defendant Blake, as administrator of Warren J. Ballou, to the bank, upon the agreement that it was to be "in full payment of claim on said note, provided the balance due on the note be paid by estate of Otis D. Ballou, or by any one for said estate or for themselves." It is the contention of the plaintiff that the bank has accepted from Allen F., the residuary devisee of Otis D. Ballou, new securities in settlement of and satisfaction for his half; that the defendant Blake can have no interest in the mortgage, as his liability (or rather that of the estate he represents) upon the note has ceased; that therefore the bill of the plaintiff should be maintained, which seeks to remove the cloud from his title, and the cross bill be dismissed, as there is no longer any debt due the bank under the mortgage. But Blake, as administrator, has paid from the private funds of the

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estate of Warren J. Ballou one half the amount due on the note when he became administrator; and, if there is no further liability on the part of the estate of Warren J. Ballou to the bank, he is entitled to hold the mortgage for the indemnity of the estate, and to enable him to restore to it that which he has paid therefrom on account of this liability.

The plaintiff fails also to show that there was any settlement with Allen F. Ballou as to his half of the debt. There was a transaction which the master finds was a transfer of a mortgage and stock to the bank as collateral security, and not in payment of the note. These securities the bank still holds, nothing having been paid upon them. Without discussing the evidence, after examining it, we are satisfied that it fully justifies this finding.

The result therefore is, that the original bill is to be dismissed; and that the plaintiffs in the cross bill are entitled to the relief prayed for, by a decree which shall entitle Blake, as administrator of the survivor of the mortgagees, to sell the estate, except those parcels heretofore released by the mortgagees with the consent of the bank, and to apply the proceeds, first to the payment of the amount now due on the note to the bank, and secondly to reimburse Blake, as administrator, for the payments made by him on the note from the private estate of Warren J. Ballou, the remainder, if any, to be held subject to the order of court.

Decrees accordingly.

J. Hopkins, (*F. N. Thayer* with him,) for the plaintiff.

F. T. Blackmer, (*F. G. Jillson* with him,) for the defendants.

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AUGUSTUS L. DAVIS & others *vs.* SUSAN MAILEY.

Essex. March 19. — April 6, 1883.

A testator gave to his wife all his real and personal estate "to her sole use, benefit and disposal;" and provided that "whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." *Held*, that the wife took all the estate which the testator could devise, with the absolute right of disposing of it as she saw fit.

PETITION for partition of certain land in Lynn. The case was submitted to the Superior Court, and, after judgment for the respondent, to this court on appeal, upon agreed facts, in substance as follows:

The petitioners and the respondent are the heirs at law and next of kin of Joseph Davis, who died on June 3, 1871, seised of the premises described in the petition, and leaving a will, which was duly admitted to probate, and which provided as follows: "I give and devise to my wife, Emily Davis, all my estate, real, personal or mixed, that I may own at my decease, wheresoever the same may be found or whatever the same may consist of, to her sole use, benefit and disposal, hereby authorizing and empowering her to execute and deliver all deeds and conveyances that may be necessary to perfect the title to any part or the whole of my estate which she my said wife may sell; and whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." The testator left no children or issue, but left a widow (who was the person named in the will), who died on October 19, 1879, leaving a will, which was duly admitted to probate, and by which she devised to her brother, John Mailey, and his wife Susan, the respondent, the premises in question for life, and, after the decease of both of them, to the heirs of John Mailey. The children of the respondent were also the children of John Mailey. Mrs. Davis never made any deed or other conveyance of the estate in question.

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If, upon these facts, the petitioners were entitled to partition, judgment was to be entered accordingly; otherwise, the petition to be dismissed.

C. P. Thompson & W. H. Niles, (*G. J. Carr* with them,) for the petitioners.

S. B. Ives, Jr. & G. B. Ives, for the respondent.

FIELD, J. The construction we give to the will of Joseph Davis is that Emily Davis took all the estate in real property, which the testator could lawfully devise, for "her sole use, benefit and disposal;" and that the expression of a desire on the part of the testator that "whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject," is not to be considered as imperative. The words, "I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter," taken in connection with the preceding provisions and the fact that the particular heirs are not designated by the testator, but are left to be determined as Emily Davis may think best, indicate that the testator intended to leave the disposition of the entire property devised to the devisee, unfettered by any legal obligation on her part to dispose of it to any particular persons or in any particular way. This construction renders it unnecessary to determine whether, if the recommendation were intended to bind the devisee, it would not be repugnant to the devise or void for uncertainty. Gen. Sts. *c.* 92, § 5. *Gleason* v. *Fayerweather*, 4 Gray, 348. *Bacon* v. *Woodward*, 12 Gray, 376. *Spooner* v. *Lovejoy*, 108 Mass. 529. *Gifford* v. *Choate*, 100 Mass. 343. *Hess* v. *Singler*, 114 Mass. 56. *Petition dismissed.*

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STEPHEN O. BROWN *vs.* EASTERN SLATE COMPANY & others.

Suffolk. Jan. 25. — April 3, 1883. FIELD & W. ALLEN, JJ., absent.

A promissory note, signed with the name of a corporation by its treasurer, and indorsed with its name by its directors, was delivered to a person, under a written agreement between him and the corporation, by which he sold property to the corporation and the corporation was to give the note as the price, and in pursuance of a contemporaneous oral agreement, made in a talk with the directors, "that there should be no personal liability on the note referred to" in the written agreement. He afterwards recovered judgment against the corporation in an action at law upon the note. *Held*, on a bill in equity against the stockholders of the corporation, to enforce payment of the judgment, under the Sts. of 1870, c. 224, §§ 39 *& seq.*, 1875, c. 177, § 1, and 1876, c. 1, § 1, that the oral agreement meant that there should be no statutory liability on the part of the stockholders; and that this agreement was admissible in defence, and was not merged in the judgment.

HOLMES, J. This is a suit in equity against original stockholders in a Massachusetts corporation, created November 5, 1877, who have never paid in full the par value of their shares, to establish and enforce a personal liability under the Sts. of 1870, *c.* 224, §§ 39 *& seq.*, 1875, *c.* 177, § 1, 1876, *c.* 1, § 1. (Pub. Sts. *c.* 106, §§ 61 *& seq.*) The original contracts on which the plaintiff recovered his judgment at law were five promissory notes, signed with the name of the company by its treasurer, and indorsed with the name of the company by its directors. These notes were delivered under a written agreement between the plaintiff and the corporation, by which the plaintiff sold property to the company and the company was to give the notes as the price, and in pursuance of a contemporaneous oral agreement, made in a talk with the directors, "that there should be no personal liability on the notes therein [that is, in the above-mentioned writing] referred to." This agreement is one of the defences relied on.

So far as its construction is concerned, we see no reason for limiting it to the directors. No one was personally liable except by statute. The stipulation therefore must be taken to refer to statutory liability. An agreement that there should be no personal liability, in the sense of no statutory liability, means on its face no statutory liability on the part of anybody, and

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there is nothing in the circumstances to cut it down. The more difficult question is, whether an oral contract of this nature does not vary the written contracts, and whether evidence of it is not therefore inadmissible.

The original contract may be laid out of the case, for the reason that that would have been satisfied by the delivery of notes on which there was no personal liability. The plaintiff could not have complained if the members had paid up their stock before the notes were handed over. But the notes which were given were notes carrying a personal liability in a certain sense, and it may be argued with more force that the oral agreement attempted to vary them in their legal effect.

The agreement does not touch anything to be read on the face of the notes. In terms, the notes promise only the payment of a sum of money by the company on a certain day. They have nothing to say about the defendants at all. If then the agreement is held to vary them in their legal effect, it must be on the ground that the statute which makes stockholders liable in certain cases makes that liability a term of the notes by implication.

With regard to this, it will be observed that the statute does not create a chartered partnership which remains a partnership and contracts as such, although granted certain corporate powers. It does not make or leave the members primary contractors or debtors. It creates a corporation out and out, and then imposes a secondary and subsidiary liability upon the members "for its [the corporation's] debts or contracts." The liability of the members does not arise until after the contract has been broken, a judgment recovered upon it, and execution returned unsatisfied. The corporation is the only promisor or debtor, it alone breaks the contract by its failure to pay, and it alone is sued. The liability of the members is no part of the original undertaking, but a consequence attached by the law to its breach.

But the rule excluding evidence of oral agreements to vary a writing goes no farther than the writing goes. And, at most, the writing only expresses the obligation assumed by the party signing it. If an oral agreement were set up to diminish or enlarge the extent of the promisor's liability for a breach of the

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written promise, it might possibly be held inadmissible on the ground that a contract is at common law nothing but a conditional liability to pay damages, defeasible by performance, and that therefore the amount of damages to be paid is part of the legal import of the written words. But, even on this point, the tendency of some Massachusetts cases has been the other way. *Ayer* v. *Tilden*, 15 Gray, 178, 183, 184. *Ives* v. *Farmers' Bank*, 2 Allen, 236. Cf. *Horne* v. *Midland Railway*, L. R. 7 C. P. 583, 591; *S. C.* L. R. 8 C. P. 131, 140; *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670, 674, 676. And the most obvious and natural view is, that the promise is the only thing which the writing has undertaken or purports to express, either in words or by legal implication. Certainly the writing does not extend to the remedies which the law will furnish for the collection of damages, even from the promisor himself, as is shown by the fact that they are governed by the *lex fori;* and, *a fortiori*, not to the collateral statutory liability of third persons not parties to the writing. The decisions of this court have gone far towards treating such a liability as matter of remedy. *Halsey* v. *McLean*, 12 Allen, 438, 442. The liability in question may be part of the obligation of contracts of the corporation in a constitutional sense, so that it could not be done away with by statute as to contracts already made. *Hawthorne* v. *Calef*, 2 Wall. 10. But the same thing is quite as clearly true of the ordinary remedies against the promisor, which no one supposes to be part of the contract itself. So of the statute of limitations. So far as the question raised in this case is concerned, the power to collect the debt of a corporation from third persons stands on the same footing as the power to levy for it upon real estate.

We have not considered whether the oral agreement is to be regarded as made with the corporation, or with these stockholders in person through the agency of the directors. It would seem to be possible to take it either way; the consideration in the former case being the delivery of the notes, in the latter, the consent to issue them. But it is not necessary to decide the point, because, even taking it to have been the contract of the corporation, the plaintiff could not strike at the members of that corporation in a court of equity through and by means of a transaction which bound him not to do so.

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It was suggested that there was a merger by the judgment. The suggestion assumes that the oral agreement was made with the corporation; but, granting this, the agreement was not merged, for the simple reason that it was wholly on one side of the judgment, which it permitted and contemplated. The equity which it raised did not modify the contract contained in the notes, as we have said already. But, if it had done so, a sufficient answer, so far as merger is concerned, would be that a joint judgment has been held not to affect even the equities of a surety in a court of law. *Carpenter* v. *King*, 9 Met. 511, 516.

Bill dismissed.

E. S. Mansfield, for the plaintiff.

C. S. Lincoln, *A. Russ*, & *C. F. Donnelly*, for the various defendants.

SAMUEL R. PAYSON & another *vs.* EBENEZER G. LAMSON & others.

Suffolk. Jan. 25. — April 3, 1883. FIELD & W. ALLEN, JJ., absent.

If a promissory note and a mortgage given to secure it, executed at the same time, do not correspond as to interest, extrinsic evidence is admissible in an action at law to show which paper expresses the real intention and agreement of the parties.

This court will not entertain a bill in equity to restrain the prosecution of an action at law, when the defence to it can be made as well at law as in equity.

C. ALLEN, J. The present defendants brought an action at law to recover back the amount paid by them, as owners of the equity of redemption of certain real estate, to the plaintiffs, as mortgagees, in excess of what was due on the mortgage. By a power of sale, the mortgagees were authorized in case of default to make sale of the premises without any order of court. It is clear that an action to recover back an excess exacted and paid under such a mortgage may be maintained, both by virtue of express statute, and also probably at common law. Gen. Sts. c. 140, § 30. *Cazenove* v. *Cutler*, 4 Met. 246. *McMurtrie* v. *Keenan*, 109 Mass. 185. *Close* v. *Phipps*, 7 Man. & G. 586. *Fraser* v. *Pendlebury*, 10 W. R. 104. The condition of the

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mortgage in the present case provided that, if the mortgagor should pay to the mortgagee the sum of $30,000 in eighteen months from date, with six per cent interest per annum thereon during said term, payable semiannually, then the mortgage, and also three notes for $10,000 each, dated the same day, signed by the mortgagor, promising to pay the said sum and interest at the time aforesaid, should be void. The notes when produced, with evidence to identify them, did not bear interest; but the mortgagees exacted payment of interest, amounting to $2700; and the action at law was brought to recover back the amount so paid.

The present plaintiffs seek by this bill in equity to restrain the prosecution of that action, and allege that, by the understanding of the parties, the interest was to be paid as recited in the mortgage, and that the notes, through the fraud of one of the defendants, and through mistake and accident on their own part, were given and accepted without bearing interest; and the bill in equity rests on the ground that the plaintiffs cannot be allowed to show these facts in defence of the action at law, and that it has already been held by this court "that said notes could be alone looked to, to ascertain what the mortgage debt was," so that the plaintiffs are remediless in a court of law.

If this were so, there would be no doubt that the bill in equity ought to be sustained. But, upon a full consideration, we are of opinion that the powers of a court of law are not so restricted. Where two papers are executed at the same time, relating to the same contract or transaction, both may be looked at for the purpose of showing what the actual contract or transaction was. If, on examination, it appears that they are in some respects inconsistent, as, for example, if a contract is executed in duplicate, and the two parts which ought to be alike are found to be different, or if a mortgage does not correspond with the note which it was intended to secure, it is apparent that the inconsistency must have occurred through some mistake or accident. It certainly is not to be supposed that the parties have understandingly intended to execute and deliver, as parts of the same transaction, papers which are inconsistent with themselves; and if it appears that they have done so, it is natural and reasonable

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to infer that one of the papers was so executed and delivered by mistake. In such case, it not being apparent on the face of the papers which one expresses the real intention and agreement of the parties, there is no good reason why extrinsic evidence should not be received in a court of law to show the fact. Each paper may be put in evidence, as an admission or declaration of whatever is therein contained. An argument may also be drawn from the circumstances of any particular case, that one of the papers would be more likely to express the true meaning of the parties than the other. But there is no legal presumption to that effect. There being, then, two inconsistent writings, both admissible as evidence of the transaction to which both relate, and there being no legal presumption in favor of either, but it being a question of fact which correctly represents the agreement of the parties, we should be slow to admit that a court of law, encountering such a state of facts, would be powerless to deal with it, and unable to consider other evidence to show which paper was delivered understandingly, and which through mistake. On the contrary, we are of opinion that, on the trial of the action at law, it would be entirely competent for the present defendants, on the one hand, to show by extrinsic evidence that the notes expressed the real understanding and agreement of the parties; or for the present plaintiffs, on the other hand, to show in like manner that the mortgage expressed such understanding and agreement.

The decision of this court, when the action at law was before it on exceptions, was entirely consistent with this view. The presiding judge at the trial had ruled, as matter of law, that, by the terms of the mortgage, the debt secured thereby was $30,000 and interest; and that it was not competent for the present defendants to prove that the notes constituted the entire mortgage debt, and that no other debt or claim existed or was intended to be secured than the notes without interest, and that the present plaintiffs had no right or claim to recover interest upon the notes, or in any way. This ruling was reversed by this court; and it was held that the mortgage was not conclusive as to the amount of the mortgage debt, that the notes might also be looked at, and that it might be shown by evidence that they expressed the true amount of indebtedness. That decision does

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not hold, and does not imply, that it would not be competent for the present plaintiffs to meet that evidence by showing that in fact the mortgage expressed the true amount of indebtedness. There is no intimation that the notes are the exclusive evidence for this purpose. *Hampden Cotton Mills* v. *Payson*, 130 Mass. 88.

Nor is there anything in former decisions of this court which upholds that view. It has indeed often been held, in this State and elsewhere, that, where there is some lack of conformity between a mortgage and the note which it was intended to secure, parol evidence is admissible to identify the note. *Goddard* v. *Sawyer*, 9 Allen, 78, 80. *Baxter* v. *McIntire*, 13 Gray, 168. *Hough* v. *Bailey*, 32 Conn. 288. So, on the other hand, it has been held that a mortgage is *prima facie* evidence of the existence of a debt corresponding with that described therein, and that the note is not the only evidence of the debt secured. *Smith* v. *Johns*, 3 Gray, 517. So where a mortgage was given to secure two notes "for the sum of five hundred dollars," and the notes, being produced and identified, were for five hundred dollars each, it was held that it might be shown by the notes and other evidence that they correctly represented the indebtedness secured by the mortgage. *Crafts* v. *Crafts*, 13 Gray, 360. So where a person had guaranteed a note for $256, and took for his indemnity a mortgage which erroneously described the note as for $236, and his title as mortgagee was questioned by an attaching officer, on the ground that the mortgage was either fraudulent at the outset or had been discharged, it was held competent for him to produce the note, with evidence of its identity as the liability intended to be secured, for the purpose of showing that there was a real liability which had not been extinguished. It was entirely immaterial to ascertain whether the amount due was $236 or $256. The holder of the note was no party to the action. *Johns* v. *Church*, 12 Pick. 557. So in a case where there was no inconsistency between the phraseology of the note and mortgage, it was held that the legal incident of three days' grace which attached to the note should be assumed to have been contemplated by the parties as incident to the mortgage debt, and that therefore a writ of entry to foreclose the mortgage for breach of condition could not properly be

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brought till after the expiration of the days of grace; and that in such case, there being but one promise to pay money, and there being no doubt as to the phraseology in which that promise was expressed, the note was the legitimate evidence of the promise. *Coffin* v. *Loring*, 5 Allen, 153. There is nothing in any of these cases to show, or to imply, that the note will, as matter of law, be deemed to be the exclusive evidence of the mortgage debt, in a case where the note and mortgage are partially inconsistent with each other. In such case, there is no legal presumption one way or the other, but the question is to be determined as a matter of fact.

In this view of the law, it was not necessary for the present plaintiffs to resort to a bill in equity for the purpose of vindicating their rights. They might safely have gone to trial again, in the action at law, and have introduced the same evidence which was introduced on the hearing of the present bill, to show that the mortgage, and not the notes, expressed the true contract between the parties; and, if such were found to be the fact, the present plaintiffs would have maintained their defence, and have been entitled to judgment.

The question remains, whether in this state of things the present bill should be entertained. We do not doubt that jurisdiction in equity exists to grant relief on the ground of fraud. But, ordinarily, if an action is brought upon any contract or evidence of indebtedness which has been obtained by fraud, whether it be a foreign judgment, a policy of insurance, or a promissory note, the defendant can make his defence at law, and there is no occasion for him to resort to a bill in equity to restrain the prosecution of the action; and such bill, if brought, will be dismissed. If no action has been brought, and if, from lapse of time, evidence is likely to disappear, or if the cause of action is liable to be transferred to some one else, or if, for any other reason, the party who is liable to be sued, or who has been sued, cannot in an action at law present his defence as fully and effectually as he could in a court of equity, and if such disability has been brought about by any fraud, the case will stand on a different ground. Where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an

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instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained. 2 Story Eq. Jur. § 885. But, on the other hand, where there is no danger of injury from lapse of time, and where the case can be as fully and fairly tried at law, there is no occasion to seek the assistance of a court of equity; and, in general, a bill should not be entertained which will have the effect to transfer the trial of the cause from a court of law to a court of equity.

In a recent case before the English Court of Appeal in Chancery, the defendant in an action at law had pleaded a receipt in full given by the plaintiff; and the plaintiff, not feeling bound thereby, under the circumstances attending the signing of the receipt, brought a bill in equity to restrain the defendant from relying on that plea, averring that he was advised that the plea was a complete defence at law. The bill was dismissed, Sir G. Mellish, L. J., saying in his opinion: "I am of opinion that, if he received such advice, it was wrong advice, and that, if the circumstances stated in his bill are correct, he had a full and complete answer at law to this plea; and it appears to me that the supposition that it is necessary to come into a court of equity for the purpose of setting aside the plea is founded on a total mistake as to what is the effect at law of signing a receipt." *Lee* v. *Lancashire & Yorkshire Railway*, L. R. 6 Ch. 527, 533. In other recent cases in England, in Ireland, and in this country, where there has appeared to be a good defence to an action at law, either on the ground of fraud or otherwise, and the defendant in such action has brought a bill in equity to restrain its prosecution, the Court of Chancery, while asserting its complete jurisdiction, has declined to exercise it, on the ground that perfect justice could be done at law. *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695. *Kemp* v. *Tucker*, L. R. 8 Ch. 369. *Hoare* v. *Bremridge*, L. R. 8 Ch. 22; *S. C.* L. R. 14 Eq. 522, before the Vice Chancellor. *Johnston* v. *Young*, I. R. 10 Eq. 403. *Life Association* v. *M'Blain*, I. R. 9 Eq. 176. *Insurance Co.* v. *Bailey*, 13 Wall. 616. This court has not heretofore had occasion to deal with a state of facts exactly like those now presented; but it has never been inclined to exercise jurisdiction in equity to

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restrain the prosecution of an action, when the defence to it could be made as well at law as in equity. *Fuller* v. *Cadwell*, 6 Allen, 503. *McBride* v. *Little*, 115 Mass. 308. *Jones* v. *Newhall*, 115 Mass. 244, 252. *Anthony* v. *Valentine*, 130 Mass. 119.

In the present case, there was a trial in the Superior Court before this bill in equity was brought; and the answer to the bill sets up, as a ground of defence, that the bill shows no ground for equitable relief, and that all the facts set out therein can be proved by parol in the action at law, and constitute a good defence thereto. This defence was thus taken seasonably. Being satisfied, for the reasons stated, that there is no occasion to transfer the trial of the cause from the court of law, the bill must be *Dismissed, without prejudice.*

J. C. Ropes & E. M. Parker, for the plaintiffs.

G. M. Stearns, for the defendants.

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INDEX.

ABORTION.

See EXCEPTIONS, 14.

ACCEPTANCE.

1. If an order for goods is addressed to a corporation, and is accepted by "A. B., treasurer," he being in fact the treasurer of the corporation, the acceptance is in form that of the corporation. *Rogers* v. *Union Stone Co.* 31.
2. In an action for the price of a monument, an acceptance of the monument by the defendant may be inferred from evidence that it has been allowed by him to remain in position on his lot for more than a year, without objection or request to remove it, and that he has since graded his lot and turfed it up to the sides of the monument. *Hedden* v. *Roberts*, 38.
3. In an action against the acceptor of a draft, there was evidence that the drawer of the draft was liable on a note held by a bank and soon to fall due; that it was agreed between the defendant, the drawer and the bank, that the defendant should accept a draft in favor of the bank, which draft should be discounted by the bank and used to pay the note, and that the note should be delivered to the acceptor. *Held*, that it was a necessary part of this agreement that the bank on discounting the draft should become the owner of it. *Mechanics' National Bank* v. *Robins*, 331.

See ACTION, 4; PLEADING, 2, 3.

ACCOUNT.

See EQUITY, 5.

ACCOUNT STATED.

An accounting together is not the creation of a new debt, but is a statement and acknowledgment of an old debt, from which a promise to pay is implied sufficient to maintain an action. *Buxton* v. *Edwards*, 567.

See PARTNERSHIP, 3.

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ACTION.

1. If a person, who has been struck by a locomotive engine, remains in a perfectly unconscious condition until his death, his administrator is not entitled, in an action against the corporation owning the engine, to recover substantial damages, in the absence of evidence of any considerable expense or loss incurred between the time of the injury and the death. *Tully* v. *Fitchburg Railroad*, 499.

2. A husband may maintain an action for the loss of the *consortium* with his wife, against a person who has criminal conversation with her, whether such conversation is with or without her consent, and although the act caused no actual loss of her service to him. *Bigaouette* v. *Paulet*, 128.

3. A purchaser in possession of property bought of a debtor, an assignment of whose estate has been made under the insolvent law, part of which property so sold belonged to him before his insolvency, and part of which was acquired afterwards, may maintain an action of tort in the nature of trover against a person who attaches the property as that of the insolvent. *Taber* v. *Lawrence*, 94.

4. B. gave to A. an order on C. payable in goods, as collateral security for promissory notes of B. C. accepted the order, and there was a good consideration as between A. and C. The notes, except one, were not paid by B., and A. made a demand on C. to fill the order according to C.'s own construction of it, and in C.'s own way. C. refused, assigning no reason except that the order was not legal. No statement was made to C. of the amount due on the notes. *Held*, that C. was liable to A. on the order to the amount of the notes not paid. *Rogers* v. *Union Stone Co.* 31.

5. B. gave A. his promissory note, payable in five years, and declared on its face to be given as collateral security for a certain agreement. On the same day, and as part of the same transaction, the parties entered into an agreement, by which it appeared that A. advanced to B. the amount stated in the note, which amount was used by B. in the purchase of a parcel of land, B. giving his promissory note, secured by a mortgage of the land, to his grantor. B. also agreed to save A. harmless from all losses which might occur "in the decrease or sale of the land," and to pay the sum advanced by A. towards the purchase, and also to pay a certain amount in one year on the mortgage, and the balance of it in five years. B. was to have full control of the land, was to pay all taxes and interest on the mortgage, and to sell the land for the joint benefit of A. and B., the proceeds of the sale, after paying the mortgage, to be divided equally between them. *Held*, that A. could, after the expiration of five years, and after breach of the agreement by B., maintain an action against him on the note. *Costelo* v. *Crowell*, 280.

6. That a person knew, when he entered into a contract in writing, not under seal, purporting on its face to be made on the other part by A. and signed by "A., agent," that A. was in fact contracting as agent for B., will not prevent him from maintaining an action against B. on the contract. *Byington* v. *Simpson*, 169.

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7. It is no defence to an action against a person, into whose coal-hole in a sidewalk on a street in a city the plaintiff stepped and was injured, that the notice of the time, place and cause of the injury, required by the St. of 1877, *c.* 234, § 3, to be given by a person injured by a defect in a highway to the "persons by law obliged to keep said highway in repair," was not given to the defendant. *Fisher* v. *Cushing*, 374.

See APPEAL, 2; BANKRUPT; BOND; CARRIER; CONTRACT, 5, 7–9; DAMAGES, 2, 3; ESTATES OF DECEASED PERSONS; ESTOPPEL, 2; EVIDENCE, 6, 14–19; FENCE; FRAUDS, STATUTE OF, 3; FRAUDULENT REPRESENTATION; IMPOUNDING OF CATTLE; INSOLVENT DEBTOR, 5; LANDLORD AND TENANT; LIMITATIONS, STATUTE OF, 2; LORD'S DAY; MALICIOUS PROSECUTION; MONEY HAD AND RECEIVED; MONEY LENT; MORTGAGE, 1; NEGLIGENCE; PARTNERSHIP, 2; PENSION; PLEADING, 2, 4; PROMISSORY NOTE, 3; RAILROAD, 2; RELEASE, 2; REPLEVIN; SURVEYOR OF HIGHWAYS; VARIANCE, 2, 3.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMISSION.

See EXCEPTIONS, 18.

ADULTERY.

See CONSPIRACY; VERDICT.

AFFIDAVIT.

See EVIDENCE, 20; EXCEPTIONS, 10.

AGE.

See EVIDENCE, 9.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIMONY.

See SCIRE FACIAS, 1; 3; TRUST AND TRUSTEE, 2.

AMENDMENT.

1. If an action is brought against an administrator on a promissory note made by his intestate, by an indorsee thereof, and this court sustains the

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defendant's exceptions on the ground that the note is not a negotiable note, it is within the discretion of the Superior Court to allow the writ to be amended by striking out the name of the plaintiff and inserting that of the payee of the note, although such amendment is after the expiration of two years from the appointment of the administrator. *Costelo* v. *Crowell*, 280.

2. A petition to the Superior Court, for the assessment of damages for injury done to the petitioner's mill by the taking by the respondent of the waters of a stream, may be amended, under the Pub. Sts. *c.* 167, §§ 41, 42, 85, so as to enable the petitioner to maintain his action for the cause for which it was intended to be brought, although a new petition would be barred by the statute of limitations. *Sanger* v. *Newton*, 308.

ANIMAL.

See EXECUTION, 1, 2; IMPOUNDING OF CATTLE.

ANSWER.

See PLEADING, III.

APPEAL.

1. An appeal lies to this court from an order of the Superior Court, granting a petition for the removal of an action to the Circuit Court of the United States. *Ellis* v. *Atlantic & Pacific Railroad*, 338.
2. If the defendant in an action brought in a municipal court answers with a general denial, is defaulted, and appeals to the Superior Court, he may, under the 43d rule of that court, requiring that "a written answer shall be filed in this court, in all appeal cases, within thirty days after the entry of the appeal, unless the court shall otherwise order," file an answer in that court, setting up, in addition to a general denial, that the action was prematurely brought; and evidence that the action was prematurely brought is properly admitted. *Fels* v. *Raymond*, 376.
3. Under the St. of 1880, *c.* 18, dividing one town and incorporating another town therein named, and providing in § 5 that in case said towns should not agree in respect to a division of debts, unpaid taxes, state or county taxes, or support of paupers, the Superior Court should, upon petition of either town, appoint three commissioners to hear the parties and determine the matters of difference, that their award, being accepted by said court, should be final, and that the court might make any order or decree upon the award, but it should not be set aside except for fraud or manifest error, in which case the court might recommit the award or appoint new commissioners, neither party has a right of appeal from the decision of the Superior Court accepting an award of commissioners appointed pursuant to the statute. *Cottage City* v. *Edgartown*, 67.

AQUEDUCT.

See DEED, 3; EXCEPTIONS, 13.

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ARREST.

See MALICIOUS PROSECUTION; POOR DEBTOR, 1, 3.

ARSON.

See EXCEPTIONS, 18; VARIANCE, 4.

ASSAULT.

It is no defence to an indictment for an assault upon a child with intent to carnally know and abuse her, that the defendant, in making the assault, threw the child into such a position that it was impossible for him to accomplish his purpose of ravishing her. *Commonwealth* v. *Shaw*, 221.

ASSENT.

See EQUITY, 4.

ASSESSMENT.

See TAX, 1.

ASSIGNMENT.

See REPLEVIN, 2; WORK AND LABOR.

ASSUMPSIT.

See ACCOUNT STATED; CONTRACT, 1.

ATTACHMENT.

An attachment of mortgaged personal property in the possession of the mortgagor is invalid, if the mortgagee, summoned as trustee, under the Gen. Sts. *c.* 123, § 67, is a resident of another State, and has no usual place of business in this Commonwealth. *Allen* v. *Wright*, 347.

See ACTION, 3; CARRIER; EXECUTION; MONEY HAD AND RECEIVED; REPLEVIN, 1.

ATTORNEY AND COUNSEL.

See EVIDENCE, 20; PENSION.

BANK.

1. If a cashier of a bank receives securities on a loan from the bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities. *Loring* v. *Brodie*, 453.

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2. If a bank receives as collateral security for a loan bonds capable of manual delivery, and is affected by the knowledge of its then cashier that the bonds are trust property, it continues to be affected by such knowledge, so long as the transaction continues, although its form is changed by new notes given in renewal, from time to time, after the cashier had ceased to be connected with the bank. *Loring* v. *Brodie*, 453.

3. If a bank makes a loan on certificates of stocks, which show on their face that they belong to a trust estate, the bank is affected with knowledge of this fact, whether the certificates are read by the officers of the bank or not. *Ib.*

4. If a bank, in which a trustee has an account, permits him to overdraw his account, and to pay the overdraft with the proceeds of trust property, which he had a right to sell, the bank is not responsible to the trust estate, if the money overdrawn is misused by the trustee, in the absence of evidence that the money was overdrawn under such circumstances that the bank was fairly put upon inquiry, whether the money was to be used for other purposes than those of the trust. *Ib.*

See COLLATERAL SECURITY; CONTRACT, 9; DAMAGES, 1, 4; EVIDENCE, 21; EXCEPTIONS, 4; PROMISSORY NOTE, 4; SAVINGS BANK; TRUST AND TRUSTEE, 3.

BANKRUPT.

Under the U. S. Rev. Sts. § 5057, an action by an assignee in bankruptcy to collect a debt due to the estate must be brought within two years from the time when the cause of action accrued to the assignee. *Ross* v. *Wilcox*, 21.

See LIMITATIONS, STATUTE OF, 1; PLEADING, 3, 4.

BAWDY-HOUSE.

See INDICTMENT.

BILL OF EXCHANGE.

See ACCEPTANCE, 3.

BOND.

1. If the payment of a legacy is charged upon land devised to a person who is also appointed executor of the will, and the legatee joins in a mortgage of the land given by the devisee to secure a sum of money borrowed for the latter's personal use, and the mortgagee afterwards sells the land under a power contained in his mortgage and applies the proceeds of the sale to the payment of the mortgage debt, the legatee loses his right to proceed against the land to enforce payment of his legacy, and an action therefor cannot be maintained for his benefit against a surety on the executor's bond. *Thayer* v. *Finnegan*, 62.

2. The failure to bring an action, within the time prescribed by the statute of limitations, for breaches of a bond given by the guardian of an insane person, in not returning an inventory within three months, and in not rendering an account within one year of his appointment, does not

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discharge the sureties on the bond from liability for a subsequent breach by the principal, in not paying upon demand to his successor, after removal from office, the estate remaining in his hands as guardian. *McKim* v. *Williams*, 186.

See CONTRACT, 10–12; EQUITY, 5, 7, 9; REMOVAL OF ACTION, 2.

BOUNDARY.

See GRANT.

BURDEN OF PROOF.

See MALICIOUS PROSECUTION; RAILROAD, 5.

CARRIER.

1. A common carrier is not liable in trover to the consignor, for surrendering the possession of goods, entrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee. *French* v. *Star Union Transp. Co.* 288.
2. A common carrier, who surrenders the possession of goods, entrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee, is not liable to an action by the consignor, after notice by him to hold the goods, for not notifying the officer or taking steps to stop the goods *in transitu*. *Ib.*

See CONTRACT, 1.

CERTIORARI.

Certiorari does not lie to quash the proceedings of a police court in issuing a warrant for the seizure of intoxicating liquors. *Lynch* v. *Crosby*, 313.

CHARITY.

See DEVISE AND LEGACY, 5; TRUST AND TRUSTEE, 5.

CHOSE IN ACTION.

See PLEADING, 4.

CITY.

See CONTRACT, 10; MASTER AND SERVANT, 1; PAYMENT; TAX, 3; WATERWORKS, 1, 2; WAY.

COLLATERAL SECURITY.

If a promissory note to a bank is signed by the maker, as trustee, and a portion of the securities deposited as collateral therefor is clearly marked as trust property, it must be inferred that the other securities, consisting of bonds capable of manual delivery, are also trust property. *Loring* v. *Brodie*, 453.

See ACTION, 4, 5; BANK, 1–3; CORPORATION, 2; DAMAGES, 4; EVIDENCE, 13; PLEADING, 3; PROMISSORY NOTE, 4.

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COMPLAINT.

At the trial of a complaint for an unlawful sale of intoxicating liquor, the identity of the offence is not to be determined solely by the date named in the complaint or that given in evidence; but, if the sale testified to in the appellate court is the same as that testified to in the lower court, it is immaterial that the witness, in fixing the date in the lower court, named one which does not correspond with that given in his testimony in the appellate court. *Commonwealth* v. *Mahoney*, 220.

See INDICTMENT; INTOXICATING LIQUORS, 1, 2, 4–9; TRIAL JUSTICE.

CONDITION.

An entry by a grantor of land, for breach of a condition annexed to the land conveyed, is not invalid for want of notice to the grantee. *Langley* v. *Chapin*, 82.

See ACCEPTANCE, 3; DEED, 1; ESTOPPEL, 1; EXCEPTIONS, 9; PAYMENT; PLEADING, 1; PROMISSORY NOTE, 3; SALE, 3.

CONFLICT OF LAWS.

See INSOLVENT DEBTOR, 5.

CONSIDERATION.

See CONTRACT, II.

CONSIGNOR AND CONSIGNEE.

See CARRIER.

CONSPIRACY.

1. It is no bar to an indictment against A. and B., for conspiracy falsely to accuse the wife of A. of adultery with B., that a divorce was granted to A. from his said wife upon his libel for the cause of adultery with B., to which she set up as a defence the charge of conspiracy contained in the indictment. *Commonwealth* v. *Nichols*, 531.

2. An indictment against A. and B. alleged that the defendants, intending to injure the wife of A., and to deprive her of her good name and character, conspired to entrap and ensnare her, and falsely to charge and accuse her of the crime of adultery with B., with the intent to induce her, through fear of being publicly charged with and prosecuted for said crime, to release, against her will, all rights of property and support to which she was and would be entitled as A.'s wife, including a release of all right of dower in A.'s real estate; and with the intent to induce her, against her will, to surrender and release all claims under a certain promissory note made by A. payable to a third person, and by the latter indorsed to her, and held by her as her sole and separate property; and with the intent that A. might

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wrongfully procure a divorce from her, against her will, for the crime of adultery falsely charged; that, in pursuance of said conspiracy, the defendants plotted that B. should lodge in the dwelling-house occupied by A.'s wife as a residence, and should get in bed alone with her, against her will, and should be found therein with her; and that B. did get in bed alone with A.'s wife, against her will, and was found therein by A. *Held*, that the indictment sufficiently alleged a conspiracy falsely to charge and accuse the wife of A. of adultery, and thereby to extort from her a release of valuable rights, and to compel her to do acts against her will, and was good. *Commonwealth* v. *Nichols*, 531.

See VERDICT.

CONSTITUTIONAL LAW.

1. Under the Const. Mass. *c.* 3, art. 1, providing that "all judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, ... provided, nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the Legislature," a judicial officer may be removed by address, for misconduct and maladministration in office, although he is liable to trial therefor, by impeachment, by *c.* 1, § 2, art. 8, of the Constitution. *Commonwealth* v. *Harriman*, 314.
2. An address to the Governor by both houses of the Legislature, under the Const. Mass. *c.* 3, art. 1, requesting the removal of a judicial officer, need not assign any reasons therefor. *Ib.*
3. The St. of 1878, *c.* 275, extending the provisions of the St. of 1865, *c.* 283, so that they shall apply, "so far as applicable, to companies, copartnerships and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer;" and providing that the tax provided for in the St. of 1865, *c.* 283, "shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations;" so far as it applies to a partnership in which, by agreement of the partners, the interest of each member may be transferred without the special assent of the other members, is unconstitutional. *Gleason* v. *McKay*, 419.

See EXCEPTIONS, 13.

CONTRACT.

I. *Making.*

1. A carrier, having a lien for freight upon an entire cargo of coal, delivered a portion of it, on the order of the consignee, to a person who had purchased the whole cargo from the consignee. Subsequently, the carrier, on the arrival of the remainder of the coal, notified the purchaser that he claimed a lien on the remainder for the freight of the entire cargo, and ordered him not to disturb or unload it. The purchaser, without right,

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appropriated the remainder of the coal to his own use. *Held*, that the fact of such taking did not, of itself, as matter of law, import a promise on the part of the purchaser to pay to the carrier the freight of the entire cargo. *New York & New England Railroad* v. *Sanders*, 53.

2. A. bought goods under a contract in writing by which the title to the goods was to remain in the seller until paid for by instalments. Subsequently, A. bought other goods from time to time, and at each time a schedule of the goods was entered upon the original contract, and A. signed an agreement upon the same instrument, stating that he authorized the additions to the within "upon the same terms, conditions and agreements" as therein contained. A. made payments from time to time, for which receipts were given "as per lease." The entire amount due not having been paid, the seller took possession of the goods under the contract, and A. replevied the goods. At the trial of the action, there was no evidence as to the appropriation of any of the payments, by either party, to any particular portion of the goods. *Held*, that these facts would warrant a finding that the successive purchases were intended to be separate contracts; and that a ruling was right, that the payments should be applied to the earliest items of the account; and that when they amounted to the price of the goods bought at any one time, there was a payment for that lot. *Swett* v. *Boyce*, 381.

See INSOLVENT DEBTOR, 4; INSURANCE, 2.

II. *Consideration.*

3. A. entered into a contract with B., as agent for C., to build two houses. After the first house was partly built, and a certain sum was due and unpaid for work thereon under the contract, A. refused to go on with the second house unless he received some security; and B. and C. thereupon executed and delivered to A. an instrument, in which they promised to pay him the sum so due within a time named, provided that A. should perform his part of the contract to build the house, and that all money paid by B. to A. on account of building the house, above the contract price, should be indorsed on the note. Afterwards A. completed both houses according to the contract. *Held*, in an action against B. and C. on the instrument signed by them, that there was a good consideration for the instrument. *Byington* v. *Simpson*, 145.

See ACCOUNT STATED; EVIDENCE, 13; PLEADING, 2; RELEASE, 1, 2.

III. *Validity.*

See PENSION.

IV. *Construction.*

4. A contract in writing provided that, in consideration of certain services rendered by the plaintiff, the defendant would pay him a sum named within a certain time after the defendant had sold and received pay for six machines, which had been invented by the defendant and of which he owned letters-patent, he being at that time alone in business. Subsequently

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he entered into partnership with a third person in the manufacture and sale of the machines, and they sold and received pay for six machines. *Held*, that this was a sale, within the meaning of the contract, whether made for the sole benefit of the defendant, or in behalf of himself and his partner. *Hanson* v. *Dodge*, 273.

5. In an action for goods sold and delivered, it appeared that the plaintiff consigned goods to the defendant for sale on the plaintiff's account; that, subsequently, the plaintiff wrote requesting the money for the goods sold, and a return of all the goods unsold which the defendant did not wish to buy; that the defendant returned the money for the goods sold, a portion of those unsold, stated that for the rest a certain sum was due, and offered to pay it by his promissory note on four months, or to return the goods. The plaintiff wrote requesting him to send the note, but received no reply. *Held*, that, in the most favorable view for the plaintiff, the sale was on a credit of four months, and not for cash. *Wilder* v. *Colby*, 377.
6. A made a contract with B., by the terms of which B. was to execute a mortgage of land to a bank, and to give to A. an order on the bank for the money obtained by means of the mortgage, and to build houses on the land in a specified manner and complete them within a certain time. A. was to advance money from time to time to B., according to the progress and quality of the work, and to retain the money received from the bank as collateral security for the money advanced by him, and for interest and commissions. The bank had previously agreed to lend B. the money, taking a mortgage as security. A. then made a contract with the bank, which, after reciting these facts, and stating that the money was to be paid A. as the work progressed, contained a covenant on the part of A. that the houses should cost not less than a certain sum each, and that B. should "complete and finish" the houses in a good and workmanlike manner. At the time this contract was made, the foundations of the houses had been put in, but the agents of the bank had no knowledge of their condition. *Held*, that A was liable to the bank for any loss caused to it by reason of the foundations being put in in an unworkmanlike manner. *Norway Plains Savings Bank* v. *Moors*, 129.

See ACCEPTANCE, 3; CORPORATION, 3; SHIP, 2; VARIANCE, 3; WORK AND LABOR.

V. *Performance and Breach.*

7. If A. makes a contract with B., by the terms of which B. is to cultivate A.'s farm on shares for one year from a certain date, and, before the end of the year, A. orders B. off the premises, refuses to allow him to go on under the contract, and lets the land to a third person by a written lease for a year, B. is entitled to maintain an action at once against A. and to recover as damages the value of the contract. *Jewett* v. *Brooks*, 505.
8. A bank took from B. separate mortgages on several lots of land, and entered into a contract with A., by which A. agreed that the houses to be built upon the land should cost a certain sum each, and be built in a good and workmanlike manner. The bank agreed, upon A.'s request, to assign to him any or all of the mortgages, upon receiving from him full payment

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of the sums advanced thereon and interest. *Held*, that it was no defence to an action by the bank against A., for breach of the contract as to the remaining parcels, that the bank, before any demand by A. for a transfer of the mortgages, had sold one of the parcels of land, under the power contained in the mortgage of that parcel. *Norway Plains Savings Bank* v. *Moors*, 129.

9. A. made a contract with a bank, which, after reciting that the bank was about to lend to B. a certain sum of money upon mortgages of certain lots of land and buildings in process of erection and to be erected thereon, and that B. had given A. an order on the bank for the money, contained a covenant on the part of A. that B. should complete the houses in a workmanlike manner at a certain cost each, and a clause whereby A. further guaranteed that the houses should be finished within a certain time; and that A. might, for his security, take from the bank an assignment of the mortgages, on paying the sums due thereon and interest. The foundations of the houses were defective to A.'s knowledge, and the houses did not cost as much as it was agreed that they should cost. The bank, in ignorance of these facts, made the last payment it had agreed to make, and subsequently agreed to surrender the contract if there were no liens on the property. The bank did not surrender the contract. At both of these times the property was of sufficient value to save the bank harmless, and to indemnify A. if he had taken the mortgages. *Held*, in an action by the bank against A. for breach of the contract, that A. was not a mere guarantor, and that the acts of the bank did not constitute such laches as would prevent it from recovering for defects in the foundations. *Ib.*

10. A contract was made by a city with several persons, by the terms of which the latter were to perform certain work for the city, and, in case of a breach on their part, the city had the right to order them to discontinue work, and to place such persons, and obtain by purchase or hire such animals, carts, implements and tools, as the city engineer might deem necessary, "by contract or otherwise," and to charge the expense thereof to the contractors. A breach took place, the contractors were notified to stop work, the city, intending to act in pursuance of the powers conferred upon it by the original contract, in good faith, and in the exercise of a reasonable discretion, made a new contract with one of the former contractors, in precisely the same terms as those contained in the first contract, he committed a breach of the new contract, and the city took possession of the work, hired men and implements, and completed the work. *Held*, in an action by the city against a surety on the bond of the first contractors, given for the faithful performance of their contract, that the defendant was not released from liability by the notice given to the original contractors to discontinue the work; and that the city had the right to act as it did after the breach of the first contract. *Newton* v. *Devlin*, 490.

11. If a person contracts to do certain work for another, and commits a breach, and the other, as he has a right to do under the contract, finishes the work at the expense of the contractor, he is bound to keep an accurate account of the money expended; yet, if by accident a book containing the account is lost, so that the amount cannot be ascertained with exact

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precision, recovery may be had against a surety on the bond of the contractor for such amount as can be ascertained with reasonable certainty. *Newton* v. *Devlin*, 490.

12. A city entered into a contract with certain persons to perform a public work. The contractors committed a breach of the contract, and the city, as it had a right to do under the contract, completed the work. *Held*, in an action against a surety on a bond of the contractors, that the city had a right to charge him for services of men who took the place of men whom the contractors would have been obliged to employ, if they had gone on with the work, although the city had employed these men, as inspectors, before the breach. *Held*, *also*, that the surety was liable for sums paid in settlement of claims for injuries accidentally done to the property of third persons by the blasting of rocks, although no notice of such claims was given to the contractors. *Held*, *also*, that the surety was not liable for surgical assistance rendered to the workmen who were injured during the progress of the work, nor for sums which the city had paid, after the breach by the contractor, for the wages of workmen hired by the contractors, for services rendered by them before such breach. *Ib.*

See ACTION, 5; FRAUDS, STATUTE OF, 2.

VI. *Rescission.*

See DAMAGES, 3.

CONTRIBUTION.

See EQUITY, 4.

CONVERSION.

A warehouseman, with whom goods were stored on A.'s account, pledged them to B., who removed them to another warehouse, and subsequently sold them as pledgee. *Held*, that B. converted the goods when he removed them under a claim of right of property in them. *Thacher* v. *Moors*, 156.

See DAMAGES, 2; NEW TRIAL; PLEADING, 6; PLEDGE; SALE, 2; TROVER, 1–3.

CORPORATION.

1. A corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, if such third persons have not acted on or seen or known of the existence of the matters so interpolated and appearing to be a part of the records. *Holden* v. *Hoyt*, 181.

2. While the Gen. Sts. *c.* 63, § 11, (which provided that no conveyance of shares in the capital stock of a railroad corporation should be valid against any other persons than the grantors and their representatives, unless recorded within ten days,) were in force, A., the owner of stock in a railroad corporation, caused a certificate to be issued to B., who executed an assignment in blank on the back thereof, and the certificate thus assigned was delivered to a bank "for the protection of the parties and as collateral

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security" for a promissory note payable to the bank, and signed by A. as principa and by B. as surety. Subsequently, the railroad corporation consolidated with another, under an agreement by which the stockholders were entitled to receive for each share of stock a bond for a certain amount. A., with the consent of the bank, obtained the certificate of stock and received the bonds, and they were paid in full, and the bank received no benefit from them. *Held*, in an action by the bank on the note against A. and B., that such consent of the bank was a good defence to B., so far as he was injured by the giving up of the stock by the bank. *Fitchburg Savings Bank* v. *Torrey*, 239.

3. A promissory note, signed with the name of a corporation by its treasurer, and indorsed with its name by its directors, was delivered to a person, under a written agreement between him and the corporation, by which he sold property to the corporation and the corporation was to give the note as the price, and in pursuance of a contemporaneous oral agreement, made in a talk with the directors, "that there should be no personal liability on the note referred to" in the written agreement. He afterwards recovered judgment against the corporation in an action at law upon the note. *Held*, on a bill in equity against the stockholders of the corporation, to enforce payment of the judgment, under the Sts. of 1870, *c.* 224, §§ 39 *& seq.*, 1875, *c.* 177, § 1, and 1876, *c.* 1, § 1, that the oral agreement meant that there should be no statutory liability on the part of the stockholders; and that this agreement was admissible in defence, and was not merged in the judgment. *Brown* v. *Eastern Slate Co.* 590.

See ACCEPTANCE, 1; BANK; COLLATERAL SECURITY; DAMAGES, 4; EQUITY, 2, 4, 7; EVIDENCE, 1, 2; RAILROAD; TRUST AND TRUSTEE, 2, 3; WATERWORKS, 2; WITNESS, 1; WORK AND LABOR.

COSTS.

1. Under the Pub. Sts. *c.* 156, § 35, this court has no power, in contested probate cases, to award counsel fees or other expenses as "costs," in addition to the taxable costs; and such power does not exist independently of the statutes. *Brown* v. *Corey*, 249.

2. In an action against a railroad corporation for diverting surface water and turning it upon the plaintiff's land, the evidence tended to show that the embankment of the railroad obstructed the flow of the surface water from the hills and down a ravine; and that the defendant had dug a ditch on the upper side of the road, and had thereby conducted said water a distance of several rods, and discharged it, through a culvert under the road, upon land of the plaintiff, where it had not been accustomed to flow. The defendant claimed the right to do this, on the ground that it was necessary to the proper construction and maintenance of the railroad. The jury returned a verdict of one dollar for the plaintiff. The question then arose as to the right of the plaintiff to costs; and the defendant asked the judge to rule that, "if the right claimed at the trial existed merely as incident to the right to construct and maintain a railroad, it would not constitute an easement." The judge "declined so to rule, and ruled to the

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contrary;" and thereupon made a certificate that a right to an easement was in fact involved in the action. *Held*, that no error appeared. *Rathke* v. *Gardner*, 14.

See EXCEPTIONS, 17, 20.

COURT.

See PROBATE COURT; SUPERIOR COURT; SUPREME JUDICIAL COURT.

COVENANT.

See CONTRACT, 9; DEED, 1; EXCEPTIONS, 12.

CUSTOM.

See EVIDENCE, 3; WORK AND LABOR.

DAMAGES.

1. If a bank lends money on a mortgage of land and houses to be built thereon in a workmanlike manner, and at a certain cost each, and a third person covenants with the bank that the houses shall be so built, in an action by the bank against such third person the measure of damages is so much of the difference between the value of the houses as built and their value if built according to the contract, as is sufficient with the value of the houses as built to pay the mortgage debt and interest at the time the houses were finished, or as soon afterwards as the bank had notice of the defects, or might have had notice with the exercise of reasonable diligence. *Norway Plains Savings Bank* v. *Moors*, 129.
2. A bailee brought an action of tort for the conversion of goods. His bailor subsequently brought an action of replevin and obtained possession of the goods. In the replevin suit a finding was made for the defendant, for want of a demand before bringing the action, and the case was continued to await the determination of the action in tort. *Held*, that these facts showed no ground of defence to the recovery of full damages by the plaintiff in the action of tort. *Pratt* v. *Boston Heel & Leather Co.* 300.
3. If A. is induced by the false representations of B. to buy property of him, and to give in payment therefor his promissory note indorsed by C., which, before maturity, is transferred by B. for value to an innocent purchaser, to whom C. pays it, and if A. rescinds the sale, or the property bought by him is of no value, he may recover, in an action against B., the amount paid by C., with interest from the time of such payment. *Grant* v. *Mellen*, 335.
4. If bonds are unlawfully pledged to a bank by a trustee, and the bank, with knowledge of this, sells them, it is liable for the value of the bonds, together with interest from the time of the sale, and such interest as it may have received on them before the sale. *Loring* v. *Brodie*, 453.

See ACTION, 1; CONTRACT, 7, 12; DEED, 2; PLEADING, 6; SALE, 2; TROVER, 1; WATERWORKS, 1, 2.

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DEATH.

See ACTION, 1; LAW AND FACT, 2.

DECEIT.

See DAMAGES, 3; PLEADING, 5; WITNESS, 1.

DECLARATION.

See PLEADING, II.

DEED.

1. A deed of real estate contained the following clause: "This conveyance is made upon the condition that the said C.," the grantee, "will erect upon said premises a cotton-factory within two years from the date hereof." *Held*, that this was a condition annexed to the estate conveyed, and not a personal covenant with the grantor. *Langley* v. *Chapin*, 82.
2. In 1867, P., the owner of a parcel of land, opened and dedicated a private way over his land to a public street. In 1871, the town authorities laid a water-pipe under this way, and extended it in the same direction under the land of C., whose land adjoined that of P., and graded the land of C. for a certain width to another public street, and put up a sign designating the part thus graded as a private way. The way thus made was thereafter used by travellers. In 1874, P. sold to C. a strip of land five feet wide bounding in fact on the way dedicated by him, but describing it as bounded on his own land, without mentioning the way. In 1879, C. sold to S. this strip of land, and also a lot in the rear, describing the whole by one description, as bounding "by a way called S. Street." In 1880, the town laid out a town way over the land dedicated by P. and over C.'s land in the place where it had been graded in 1871. *Held*, on a petition by C. against the town to recover damages for the land so taken, that C. was estopped by his deed to S. to deny the existence of the way over his own land; and that the right of way of S. was an encumbrance which the jury might consider in estimating the value of the land taken by the town. *Crowell* v. *Beverly*, 98.
3. A deed to an aqueduct corporation, after reciting that the corporation proposed sinking an aqueduct from one point to another named, "to accomplish which it will be convenient to dig and lay logs through lands" of the grantors, provided that the grantors "bargain and agree that the above-mentioned aqueduct company or their agents shall have liberty to enter upon said lands for the purpose of digging and completing said aqueduct, and at all times thereafter to enter upon said lands when necessary to repair the same." *Held*, that the corporation might enter upon the land, and increase the size of its pipes or relay its pipes upon the line originally adopted, but that it could not lay or relay its pipes upon a new line differing from the original location, and was liable in tort for so doing. *Held*, *also*, that if by inadvertence or mistake, or under the belief that it had the right to do so, the corporation dug a new trench in a line differing from

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the former one, it did not thereby abandon or lose its easement, but, upon discovering its mistake, might relay its pipes upon the original line. *Marsh* v. *Haverhill Aqueduct Co.* 106.

4. A deed described a parcel of land in a city as bounded and described according to a certain plan, and gave the metes and bounds, the front line being on a street named, one of the side lines being on a street described as a street forty feet wide, and the rear line being on land of a railroad corporation. The plan showed that part of the rear line was a curved line; that on the other side of the street forty feet wide was a lot of land with a frontage of two hundred and sixty feet; that in front of this lot was an open triangular space formed by the street in front of the lot and another street approaching at an acute angle, the side lines of the streets next to this space not being shown. These streets and the open space were owned by the grantor. The streets and the land were then only in part filled and graded. *Held*, that the grantee did not have the right to have the triangular piece kept open. *Williams* v. *Boston Water Power Co.* 406.

See EASEMENT; EXCEPTIONS, 13; GRANT; PAYMENT; PRINCIPAL AND AGENT, 1; RELEASE, 3;

DELIVERY.

See HUSBAND AND WIFE, 2; MORTGAGE, 4; PRINCIPAL AND AGENT, 1; SALE, 1.

DEMAND.

See LIMITATIONS, STATUTE OF, 2; TROVER, 2.

DEPOSITION.

See EVIDENCE, 2.

DEVISE AND LEGACY.

1. The will of a married woman, to which her husband had not signified his assent, after giving several legacies, devised all the residue of her estate, real and personal, to her husband, he "to keep in good repair all the buildings during his lifetime," and appointed the husband executor. The only property left by the wife was the homestead estate where she had lived with her husband. He was duly appointed executor, gave a bond as such, but did not pay any of the legacies, and no demand was made upon him therefor, lived upon the estate until his death, eight years after his wife's, kept the buildings upon it in good repair, and assumed to dispose of it by will. *Held*, that an administrator with the will annexed of the wife's estate was rightly granted a license by the Probate Court to sell the estate for the payment of legacies, nine years after the death of the wife. *Smith* v. *Wells*, 11.

2. A testator gave to his wife all his real and personal estate "to her sole use, benefit and disposal;" and provided that "whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am

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willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." *Held*, that the wife took all the estate which the testator could devise, with the absolute right of disposing of it as she saw fit. *Davis* v. *Mailey*, 588.

3. A testatrix appointed her eldest son executor of her will, and gave to him all her property, real and personal, he to pay all her debts and also to pay the school and college expenses of her younger son, and made no other provision for the younger son. Her personal property amounted to $20, and her real estate to $1500. *Held*, that the legacy to the younger son was a charge upon the real estate. *Thayer* v. *Finnegan*, 62.
4. A testator provided in his will for the erection of a monument in memory of himself and his wife, at a cost named. His wife left a will, which, after giving several specific legacies, contained the following residuary clause: "My house and furniture, silver plate, fixtures and everything to be sold, if there should not be enough from my husband's estate for a monument, I wish to have my money expended for a monument of granite, ... if there should be money enough left from my husband's estate. I want a memento of Hope, Faith and Charity, the expenses to be taken from my own estate, and his name cut on the steps, the remainder left I wish it to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through." *Held*, that the testatrix intended to direct that her house and other property should be sold for the purpose of erecting the monument provided for by her husband's will with the proceeds, in case his estate should not be sufficient for that purpose; that, in case there was money enough for that purpose from his estate, a memento was to be erected, at the expense of her own estate, which was to be a design of Hope, Faith and Charity, upon which her husband's name was to be cut; and that the remainder of her property was to be held in trust to beautify and keep in order the monument. *Bates* v. *Bates*, 110.
5. A provision in a will, establishing a fund for the preservation, adornment and repair of a private monumental structure, creates a perpetuity for a use not charitable, and is void. *Ib.*
6. A right, given by a will, to sell property for an object which cannot be accomplished, cannot itself be exercised. *Ib.*

See BOND, 1; EQUITY, 9; TRUST AND TRUSTEE, 5, 6.

DIVORCE.

See CONSPIRACY, 1.

DOG.

1. Under the St. of 1867, c. 130, § 1, requiring the owner or keeper of a dog to cause it to be registered and licensed for one year "in the office of the clerk of the city or town wherein said dog is kept," and § 5, providing that "a license from the clerk of any city or town shall be valid in any part of the Commonwealth, and may be transferred with the dog licensed, provided said license be recorded by the clerk of the city or town where such dog is kept," if the keeping of a dog is transferred from the city or town

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in which it is registered and licensed, the license must be recorded in the city or town where, after such transfer, the dog is kept. *Commonwealth* v. *Palmer*, 537.

2. If the owner of a dog takes it to a town other than that in which it is registered and licensed, and keeps it there for four months, although he goes there for no definite period and with the intention only of remaining there temporarily for rest and recreation, and leaves his home ready for occupancy upon his return, and comes to the place in which it is situated every day to his business, the dog is "kept" in the town to which it is so taken, within the meaning of the St. of 1867, *c.* 130, §§ 1, 5. *Ib.*

DRAIN.

See TOWN, 1.

EASEMENT.

If a person has a privilege of taking stones and gravel from land of another, where it is most convenient and least prejudicial, to build and repair a dam and canal, and a privilege of passing and repassing from a road through the land with teams, by gates or bars, for the purpose of building and repairing said dam and canal, where most convenient and least prejudicial, the owner of the land subject to the easement is entitled to reasonable notice of the intention of the owner of the easement to make repairs, before being liable to an action for obstructing the right of way. *Mansfield* v. *Shepard*, 520.

See COSTS, 2; DEED, 2-4; EVIDENCE, 6; EXCEPTIONS, 20.

EMINENT DOMAIN.

See EQUITY, 10; WATERWORKS.

EQUITY.

1. This court will not entertain a bill in equity to restrain the prosecution of an action at law, when the defence to it can be made as well at law as in equity. *Payson* v. *Lamson*, 593.
2. The receivers of a savings bank, which has illegally invested its deposits in a promissory note bearing the name of but one promisor, may maintain a bill in equity against a person who is in possession of such note through an abuse of power by the treasurer of the bank, to compel the surrender of the note. *Holden* v. *Upton*, 177.
3. A bill in equity may be maintained, by the owner of a promissory note and a mortgage securing it, to restrain a sale of the property covered by the mortgage, and to compel the surrender of the note and mortgage, by a person claiming to hold them under a transfer fraudulently made to him by an agent of the owner. *Holden* v. *Hoyt*, 181.
4. The constitution of a voluntary association defined its object to be to stimulate a healthy interest in the breeding and management of pigeons and bantams, and to disseminate useful knowledge in relation thereto;

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gave the board of directors the charge and management of all pu[illegible] exhibitions of the society; and provided that each member should pay [illegible] initiation fee and an annual assessment. The society held a public ex[illegible] bition and awarded premiums, and the expenses, including the premiu[illegible] were greater than the receipts. *Held*, that a bill in equity could be ma[illegible] tained, by those members who paid the loss, against other members f[illegible] contribution, if the defendants participated in a vote to give the exhibitio[illegible] with premiums, or if they assented to such vote. *Ray* v. *Powers*, 22.

5. A bill in equity, for an account, alleged that the plaintiff and the defe[illegible] ant were administrators of an estate, and had given a joint bond; tha[illegible] they, with a third person, were the only next of kin of the intestate; tha[illegible] the estate had been settled in the Probate Court, and the defendant ha[illegible] failed to include in the inventory and account certain assets of the esta[illegible] in his possession; that the plaintiff had assented to the final account, an[illegible] had receipted for his interest, upon the defendant's agreeing that thi[illegible] should not prejudice the plaintiff's right to his share of the assets in que[illegible] tion; and that the third person had been paid his share. *Held*, on de[illegible] murrer, that the bill could not be maintained. *Foster* v. *Foster*, 120.

6. Upon the dissolution of a partnership existing between A. and B., all matters between them were settled with the following exceptions: after the death of B. a sum of money due to the partnership was held by a third person, and the proper distribution of this money was submitted by A. and the administrator of B. to an arbitrator, under whose award one half was paid to each party. Subsequently A. learned that B. received during the continuance of the partnership, a sum of money on partnership business, which had not been entered on the books or accounted for by him, one half of which belonged to A. B.'s estate had been represented insolvent, a partial distribution to creditors was made under order of court, and the balance in the administrator's hands was less than the amount remaining due to creditors; and no debts were due to or from the firm. *Held*, that A. could not maintain a bill in equity against B.'s administrator and C., who held the sum so received and unaccounted for by B., to enforce payment of the share of said sum belonging to A. *White* v. *Chapin*, 230.

7. A corporation conveyed all its property to trustees to secure the payment of certain bonds issued by it and payable to bearer. One of the bonds, duly executed, and payable in five years, with interest coupons attached, was lost before issue. Receivers of the corporation were subsequently appointed by this court, with power to collect the assets of the corporation, pay the debts, and divide the balance among the stockholders. The trustees, at the request of the receivers, released to the receivers the property held in trust, and accepted from the receivers a sum of money as security for the lost bond, until such time as the lost bond and coupons should be paid, or the rights of any holder thereof be extinguished. The receivers paid all the debts of the corporation and the bonds which had been issued. Nine years after these bonds were paid, the lost bond not having been presented for payment, the receivers, being ready to close their trust, brought a bill in equity against the trustees to compel a transfer of the

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sum of money deposited as security for the lost bond, but did not offer to give security which might avail the bondholder if one should appear. The court ordered notice by publication to any one having an interest in the bond, which order was complied with, and no such person appeared. *Held*, that the bill could not be maintained. *Sohier* v. *Lamb*, 275.

8. The plaintiffs in a bill in equity were the members of an association, and trustees for it of a patent, which was sold to a third person for a certain sum, and the defendants were authorized to receive the money for the use of the shareholders. The defendants accepted the money on the terms of a receipt or covenant, by which they agreed to hold it until certain documents and the great seal of the patent were delivered to the purchaser, and to repay the money to him if all the things mentioned were not done as agreed. These things were not done, and the purchaser notified the defendants to retain the money. *Held*, that the defendants accepted the money as stakeholders for both parties until the conditions were fulfilled; and that the bill could not be maintained. *Smith* v. *Moore*, 405.

9. If one of several executors of a will, who are also residuary devisees and legatees, is a devisee of a parcel of land on the condition of his paying a certain legacy, and accepts the devise, the giving of a bond by all the executors, conditioned to pay debts and legacies, will not vest in him an absolute title to the land so devised, which he can convey to a *bona fide* purchaser free of the lien for the legacy; and such purchaser cannot maintain a bill in equity to compel the legatee to seek payment of the legacy from the residuary estate, or from the sureties on the bond, before proceeding against the land. *Amherst College* v. *Smith*, 543.

10. A statute authorized the extension of a railroad, and provided that it should not cross any existing railroads at grade, and that all necessary structures for crossing under grade should be subject to the approval of the railroad commissioners. A plan for the proposed structure by which a railroad was to be crossed was prepared and submitted to the railroad commissioners, and, a hearing being had, was approved by them. After the hearing, and before being notified of the approval, the railroad company whose location was to be crossed extended a siding so as to make a second track at the point of crossing. The other railroad company tore up this siding, and removed the embankment supporting the same. The track of the railroad, as it existed at the time of the hearing, was not disturbed, and the extension of the railroad was constructed under the same, in accordance with the plan proposed to, and approved of by, the commissioners. *Held*, that the railroad company whose location was thus interfered with could not maintain a bill in equity against the other railroad company to restrain it from tearing up the siding and removing the embankment, and to recover damages for such acts. *Fitchburg Railroad* v. *New Haven & Northampton Co.* 547.

11. A. gave a mortgage of real estate to B. and C. to secure them against liability as sureties on a promissory note of even date given by A. to a bank for money lent. It contained a power of sale upon default for breach of the condition, included in which was the payment of the note by the principal to the holder, which power was to be exercised by the

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mortgagees or the survivor or the executor or administrator of the sur. of them. Afterwards, A., who occupied the mortgaged premises, ex. a quitclaim deed of the same to B. and C., who gave a bond to re. them, within a time named, upon certain terms and conditions. quitclaim deed was recorded, but the bond was not, and A. never com. with its terms. The mortgage when made was delivered to the b. pursuance of the original agreement between the parties, and was re. the loan was then made to A., and the mortgage has since remained custody of the bank. Sales, with warranty, of portions of the mor. premises were subsequently made, some of which were assented to by bank after they were made, and others were previously authorized by bank, payment of sums satisfactory in amount upon the mortgage be. made in all cases, and receipts therefor given by the bank. One ha. the amount then due on the note was afterwards paid to the bank by administrator of C., who survived B., upon the agreement that it was be "in full payment of claim on said note, provided the balance due the note be paid by estate of B., or by any one for said estate or themselves." Such balance was not paid to the bank. A creditor of residuary devisee of B. filed a bill in equity to have the mortgage decl. of no validity, and to restrain the administrator of C. from selling mortgaged premises to satisfy the balance claimed to be due the bank up. the note. C.'s administrator, the residuary devisee of B. and the b. filed a cross bill, asserting the existence of the debt to the bank, the va. lidity of the mortgage, and the right of C.'s administrator to sell re. real estate to satisfy the debt still due the bank and to reimburse its sureties for the sums paid by them. It was found as a fact, that wh. the quitclaim deed was made by A. to B. and C., it was not intended by the parties to operate as a merger of the mortgage title. *Held*, that the original bill should be dismissed; and that the cross bill could be main. tained. *Aldrich* v. *Blake*, 582.

See CORPORATION, 3; FIXTURE, 1; PARTNERSHIP, 1; REMOVAL OF ACTION, 1; TRUST AND TRUSTEE, 2.

ESTATES OF DECEASED PERSONS.

1. A creditor, who recovers a judgment against an executor, in an acti. upon a debt due from the testator, brought within the two years limited by the Gen. Sts. *c.* 97, § 5, is not entitled, the execution issued on the judgment not being satisfied, to bring an action upon the judgment aft. the expiration of the two years, although the bond given by the execut. who is also residuary legatee, is one conditioned to pay debts and legacies. *Jenkins* v. *Wood*, 115.

2. An action against an administrator, for the expenses of the funeral of his intestate, brought within a year of the publication of notice of his appoint. ment, is within the exception in the Gen. Sts. *c.* 97, § 16, of "a demand that would not be affected by the insolvency of the estate," and may be maintained. *Studley* v. *Willis*, 155.

See DEVISE AND LEGACY, 1; EQUITY, 5.

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ESTOPPEL.

1. A. was in possession of chattels bought under different contracts from B., by the terms of which the chattels were to become A.'s property when paid for. Being notified by B. that he would take possession of the chattels for breach of the contract, A. applied to C. for assistance, representing that a certain sum was due on account of the chattels, but saying nothing as to that sum being due upon any particular part of them. C. declined to assist A., and subsequently bought B.'s interest in the contracts for the sum which A. had represented was due, and took possession of all the chattels. *Held*, in an action of replevin by A. against C., that A. was not estopped to deny that the amount he represented as due did not apply to any particular chattels. *Swett* v. *Boyce*, 381.
2. If an officer sells goods taken on a void execution, after having been notified by a creditor, who has placed in his hands another execution against the same debtor, that he claimed the first execution to be void, and that, if the officer sold the goods under it so that they could not be taken upon his execution, he should hold him responsible therefor, such creditor, by purchasing the goods at the sale and receiving possession of them, is not estopped from maintaining an action against the officer. *Brayman* v. *Whitcomb*, 525.

See DEED, 2; DEVISE AND LEGACY, 1; EVIDENCE, 14; EXCEPTIONS, 12.

EVIDENCE.

1. If the books of a corporation are admissible in evidence, and are not within the jurisdiction of the court, copies of them properly verified are admissible. *Ide* v. *Pierce*, 260.
2. The treasurer of a foreign savings bank, having answered, to an interrogatory in a deposition, that the books of the bank, which were in his custody, showed that the bank had had business with a certain person, was asked to give an exact transcript of the entries in the books relating to the business. His answer was, "See statement annexed." What purported to be a transcript of the books relating to the business was annexed to the deposition. *Held*, that it sufficiently appeared that the transcript had been compared with the originals, and was a true copy. *Ib.*
3. The plaintiff declared upon an account annexed for the price of a monument. The answer set up that the contract was for a monument and two tablets to be made and erected in the defendant's cemetery lot; and that the plaintiff had not performed or offered to perform this contract. At the trial, the plaintiff denied that the contract included two tablets, and did not contend that he had furnished or offered to furnish the tablets, but offered evidence tending to show that the defendant had not selected the tablets, and had not designated the inscriptions to be put upon them; and also offered evidence of a general custom among manufacturers of monuments, that when a special contract is made for a monument and accompanying tablets to be set up in a cemetery lot, and when the contract

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includes tablets and a monument and the setting of the same, not to nish the tablets until the purchaser has selected them and furnish lettering for them. *Held*, that evidence of the custom offered was missible. *Hedden* v. *Roberts*, 38.

4. At the trial of an action for the price of milk, alleged to have been plied to the defendant daily between two dates named, the plaintiff evidence tended to show a daily delivery of milk to the defendant of cans a day. The defendant testified that his daily rate of supply was cans; but that during part of the period covered by the declaration had been supplied by another dealer. He then offered the evidence this dealer that he had supplied the defendant at the rate of six cans day during part of the time covered by the declaration. *Held*, that evidence offered was admissible. *Sias* v. *Munroe*, 153.

5. At the trial of an indictment for manslaughter, in which the evidence shows that the deceased made an attack upon the defendant, on the issue whether the defendant acted in self-defence and under a reasonable prehension of bodily harm, evidence is admissible in defence that the deceased was a larger and more powerful man than the defendant. *Commonwealth* v. *Barnacle*, 215.

6. Evidence that a son, after the death of his father, lived some of the time in a house with his mother at her request, occupying half of the house without any express agreement as to his occupation thereof, and some the time in another house, both houses being set off to his mother as dower, with certain easements connected therewith, will not warrant a jury in finding that the son had such a right of possession as to entitle him to maintain an action against one interfering with the easements during the life of the mother. *Kimball* v. *McIntosh*, 362.

7. In an action against a town to recover a sum voted by the town to the plaintiff as compensation for injuries received by him while in the employ of the town, evidence of a conversation between the plaintiff and his attending physician, in which the plaintiff asserted that he had a legal claim against the town, and the physician expressed to him his opinion that he had such a claim, is inadmissible. *Matthews* v. *Westborough*, 555.

8. In an action against three defendants, for obtaining by fraud a conveyance of real and personal property of the plaintiff, one of the defendants testified that he acted in good faith, and that his only connection with the matter was in making an advance to one of the co-defendants, and in selling the personal property as an auctioneer. *Held*, that evidence was inadmissible, in his favor, that the co-defendant had previously applied to another auctioneer to make an advance and to sell the same property, who was not employed because he charged more than the defendant. *Holmes* v. *Flanders*, 147.

9. At the trial of a complaint for selling intoxicating liquors to a minor, a witness, who testifies to the fact of the sale and the general appearance of the person to whom the sale was made, may give his opinion as to the age of such person. *Commonwealth* v. *O'Brien*, 198.

10. In an action for an injury to a horse caused by the defective construction of a railroad, the testimony of an expert that, in his opinion, a cattle-

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guard or barrier was necessary at a particular point, is incompetent. *Amstein* v. *Gardner*, 4.

11. On the issue of the value to the plaintiff of a contract which the defendant has broken, a hypothetical question to an expert which does not accurately state the terms of the contract is inadmissible. *Jewett* v. *Brooks*, 505.

12. Oral declarations of a testator, made after the cancellation of a will, are admissible in evidence for the purpose of showing whether he thereby intended to revive a former will which has not been destroyed. *Pickens* v. *Davis*, 252.

13. Oral evidence is inadmissible to show that a formal bill of sale of personal property, acknowledging receipt of the consideration therein named, was given as security for a loan of the amount of the consideration. *Philbrook* v. *Eaton*, 398.

14. In an action upon a non-negotiable promissory note, signed by the defendant, and payable to a third person or bearer, the plaintiff offered to show that, when the defendant gave him the note, he told the defendant it should be in his name or to his order, and that the defendant replied, "It is all right, it makes no difference, it is payable to bearer, and you can collect." *Held*, that the evidence was inadmissible to vary the legal effect of the instrument; and that it could not operate as an estoppel to prevent the defendant from contending that the plaintiff could not maintain an action on the instrument in his own name. *Whitwell* v. *Winslow*, 343.

15. If a promissory note and a mortgage given to secure it, executed at the same time, do not correspond as to interest, extrinsic evidence is admissible in an action at law to show which paper expresses the real intention and agreement of the parties. *Payson* v. *Lamson*, 593.

16. In an action on a premium note given to a life insurance company, it appeared that the company gave a written receipt for the note, by which it agreed to return the payment if a "local board" was not organized by the company. *Held*, that evidence was admissible, in defence, of false and fraudulent representations as to who should constitute this board and their qualifications. *Penn Ins. Co.* v. *Crane*, 56.

17. In an action on a debt due from a partnership, to which the defence is payment by a promissory note of the successors in business of the old firm, the plaintiff may put in evidence what was said when the note was given; and, if it appears that he has offered proof of the note against the insolvent estate of the new firm and has withdrawn the proof, evidence is competent, on the issue whether he had knowledge or notice of the dissolution of the old firm, that he supposed when he proved the note that it was the old firm that had gone into insolvency. *Buxton* v. *Edwards*, 567.

18. In an action for the price of goods sold, upon the issue whether the plaintiff sent a bill of the goods by mail to the defendant and the defendant received it, evidence is admissible that upon the envelope containing the bill was printed a request for a return of the letter to the post-office address of the plaintiff, if not called for in ten days, and that it was not returned to him. *Hedden* v. *Roberts*, 38.

19. In an action of tort for fraudulent representations in the sale of a business, a letter from the plaintiff to the defendant, suggesting charges of

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false representations, and attempting to obtain a settlement, is inadmissible in evidence in favor of the plaintiff. *Percy* v. *Bibber*, 404.

20. An affidavit, made and signed by the attorney of one party to an action, — stating that a material witness is sick and unable to attend the trial, and would, if present, testify to certain facts set forth, as he has been informed by his client, — and filed for the purpose of procuring a continuance of the trial, which is refused, upon the adverse party admitting that the witness would, if present, testify to the facts stated in the affidavit, and agreeing that the same should be received and considered as evidence, is not admissible in evidence for the adverse party, upon the witness appearing and testifying materially differently from what it was stated in the affidavit he would testify to, it not appearing that the affidavit was known to or authorized by the party in whose behalf it was made. *Murray* v. *Chase*, 92.
21. If a cashier of a bank is also acting as agent of a person, an account rendered by him as agent to his principal of moneys deposited in the bank and drawn out by him, as agent, is not admissible as primary evidence as against the bank. *Loring* v. *Brodie*, 453.
22. The magistrate presiding at an inquest, under the Pub. Sts. *c.* 26, is only required, by § 15, to file his report with the records of the Superior Court; and if he files, with the report, his minutes of the testimony taken at the inquest, one indicted for killing the person on whose body the inquest is held is not entitled to put in evidence the fact that the testimony was so filed, and that it was afterwards suppressed by the government. *Commonwealth* v. *Ryan*, 223.

See ACCEPTANCE, 2; APPEAL, 2; CONTRACT, 11; CORPORATION, 3; EXCEPTIONS, 5–7, 10, 14–16, 18; FRAUDS, STATUTE OF, 3; FRAUDULENT REPRESENTATION; INTOXICATING LIQUORS, 5–7, 9; JURY; LAW AND FACT, 2; MALICIOUS PROSECUTION; NEGLIGENCE, 1, 2; PLEDGE; POOR DEBTOR, 2; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 4; RAILROAD, 3–5; SALE, 2; SCIRE FACIAS, 2; TOWN, 3; TROVER, 1, 3; VARIANCE; WAY, 4; WILL; WITNESS; WORK AND LABOR.

EXCEPTIONS.

1. A question not raised in the court below is not open upon a bill of exceptions. *Penn Ins. Co.* v. *Crane*, 56.
2. The objection, that an agreement relied upon in defence of an action was made on the Lord's day, not taken at the trial, is not open upon a bill of exceptions. *Petty* v. *Allen*, 265.
3. A motion for a new trial, based upon reasons relating entirely to rulings or omissions to rule during the progress of the trial and before verdict, to which the aggrieved party had full opportunity to except but omitted to do so, is addressed to the discretion of the presiding judge, to the exercise of which no exception lies; and the Pub. Sts. *c.* 153, § 8, do not apply. *Commonwealth* v. *Morrison*, 189.
4. Whether a bank, having deposits standing in the names of two separate persons, which are spelled differently, but pronounced alike, in paying the

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amount due to one of these depositors, ought to have known or supposed that he was the person intended as the defendant in a trustee process served upon the bank, in which his name was spelled like that of the other depositor, is a question of fact, upon which the finding of the Superior Court is not open to revision in this court. *White* v. *Springfield Inst. for Savings*, 232.

5. No exception lies to the admission of evidence which is competent for any purpose, if the excepting party does not ask for an instruction limiting its effect. *Penn Ins. Co.* v. *Crane*, 56.
6. No exception lies to the admission of evidence to rebut immaterial evidence. *Teague* v. *Irwin*, 303.
7. A party who has succeeded, against the objection of the adverse party, in introducing incompetent evidence, has no ground of exception because the presiding judge does not give it the weight it would be entitled to if competent. *Philbrook* v. *Eaton*, 398.
8. The finding by the presiding judge, at the trial of a writ of entry, without a jury, that neither the tenant nor his grantor had had such possession of the demanded premises for six years as to entitle either of them to improvements, is conclusive. *Langley* v. *Chapin*, 82.
9. On a writ of entry, brought by one of two grantors of land against a person claiming under the grantee, to recover the land, on the ground of a breach of a condition annexed to the land conveyed, the tenant's bill of exceptions stated that the demandant entered for breach of condition, and that the other grantor subsequently conveyed his interest to him. *Held*, that, as the respective interests of the grantors did not appear in the exceptions, and as the entry by the demandant might have been made as co-tenant or agent of the other grantor, the exceptions did not show that the entry was not sufficient to revest the entire estate; and that the subsequent conveyance was not one of a mere right of re-entry. *Ib.*
10. At the trial of an action for breach of an agreement to save the plaintiff harmless from all loss by reason of any liens and encumbrances upon a horse, alleged to have been bought by the plaintiff of a third person, an affidavit put in evidence tended to show that the plaintiff bought the horse of the defendant. The judge instructed the jury that, "if the testimony as given in the affidavit is a full and true statement of the contract and arrangement whereby the plaintiff obtained the horse, he cannot recover in this action, because the contract therein stated is materially different from that set out in the declaration." *Held*, that the plaintiff had no ground of exception. *Stratton* v. *Hill*, 27.
11. At the trial of an action for breach of an agreement to save the plaintiff harmless from all loss by reason of any liens and encumbrances upon a horse, alleged to have been bought by the plaintiff of L., and on which the defendant held a mortgage, and of a warranty that the horse was free from all encumbrances, the answer to which set up the statute of frauds, the plaintiff asked the judge to rule that "if the defendant said to the plaintiff, 'I will guarantee the horse to you in case you will buy him of L.,' that contract would not be within the statute of frauds;" and that "if the plaintiff said to the defendant, 'I will buy the horse of L. if you

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will guarantee the title, but not otherwise,' and the defendant said, 'All right, I will so guarantee the title if you will pay me $50 of the purchase money,' that contract would not be within the statute of frauds." The judge declined so to rule, but gave full general instructions upon the statute of frauds, which were not excepted to, and which did not appear in the bill of exceptions. *Held*, that the plaintiff had no ground of exception. *Stratton* v. *Hill*, 27.

12. At the trial of a petition for the assessment of damages caused by the taking of land by a town, it appeared that the petitioner had conveyed a parcel of land to one S., bounding it upon a way, a part of which way ran over his own land and a part over the land of an adjoining owner, the latter part lying directly in front of the land granted The judge instructed the jury, that the petitioner was estopped, so far as S. was concerned, from denying the existence of the way, and could not shut up the portion of the way which was upon his own land; that this would constitute an encumbrance on the land, which the jury might take into consideration in estimating the value of the land; and that "the description in the deed to S. was a covenant that there was such a way." *Held*, that the instruction was erroneous in stating that the deed operated by way of covenant, but that this error did not prejudice the petitioner; and that he had no ground of exception. *Crowell* v. *Beverly*, 98.

13. If an aqueduct company has the right to exercise certain rights in the land of a person by deed, and a statute is passed authorizing it to take land by the right of eminent domain, and it then does acts on the land in excess of the powers granted it by deed, a finding, in an action of tort brought against it by the owner of the land, that it did not act under the statute, renders the question of the constitutionality of the statute immaterial. *Marsh* v. *Haverhill Aqueduct Co.* 106.

14. On an indictment for unlawfully using an instrument upon a woman, with intent to procure a miscarriage, the defendant's bill of exceptions stated that, in the course of the trial, there was evidence that the woman went to the house of the defendant, remained there half an hour, and then came out and met a man, who had accompanied her to the house, and that this was the time when the government contended the operation was performed; that the government, against the objection of the defendant, was further permitted to prove, as tending to show that such an operation was performed, that the woman, when she met the man, said to him, "Oh dear, I feel weak!" and that the judge ruled that all exclamations made by the woman, indicating present pain, were admissible for that purpose. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Fenno*, 217.

15. At the trial of an indictment for the murder of a woman by poison, there was evidence that the life of licentiousness and debauchery which she had led would account for her death and the symptoms attending her last sickness; and that her reputation for sobriety was not good. The defendant then offered to show particular occasions when the woman had been seen drunk. This evidence was excluded. *Held*, that, as it did not appear that the particular acts of drunkenness were connected with the death of the

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woman, or were near the time of her death, the defendant had no ground of exception. *Commonwealth* v. *Ryan*, 223.

16. If a bill of exceptions states that the defendant introduced evidence of a conversation between the plaintiff and a third person in a certain month, and that, in reply, the plaintiff testified to a conversation with this third person in the same month and relating to the same subject matter, the defendant shows no ground of exception, although the bill of exceptions does not distinctly state that the plaintiff's testimony related to the same conversation, and it would otherwise be immaterial. *Teague* v. *Irwin*, 303.

17. In an action of contract, on a promissory note, the defendant filed an answer in recoupment, for a larger amount than the note. At the trial in the Superior Court, the evidence tended to show that the defendant's damages were less than the note. The jury returned a verdict for the defendant, which the court set aside of its own motion. The defendant then moved that a verdict be entered for the plaintiff for the difference between the amount of the note and the damages which the evidence showed that the defendant had sustained. The court overruled the motion; and the defendant alleged exceptions. *Held*, that the exceptions must be overruled, with double costs. *Phillips* v. *Granger*, 475.

18. At the trial of an indictment for arson, the defendant's son testified that, at the fire or soon after, he asked the defendant, "What did you want to set this afire for?" and that the defendant made no reply. The judge instructed the jury that, if the defendant did not hear the question, he was not bound to answer; if he did, the jury would consider whether or not, under the circumstances, he was bound to answer, and how far any inference was to be drawn against him for not answering. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Brailey*, 527.

19. Under the 37th rule of the Superior Court, the mere handing to the judge presiding at the trial of written requests for instructions, does not necessarily imply that, if the requests are not granted, an exception is saved. *Leyland* v. *Pingree*, 367.

20. If the certificate of a presiding judge, under the Pub. Sts. *c.* 198, § 6, relating to costs, that an easement is concerned in an action, is based upon a ruling on a question of law, to which exception is taken, such ruling may be revised by this court. *Rathke* v. *Gardner*, 14.

21. If the report of a commissioner, to whom a petition to establish the truth of exceptions has been referred, states that the bill of exceptions tendered would be conformable to the truth with certain words stricken out, and certain other words added, and the changes suggested are immaterial, the truth of the exceptions will be taken as established. *Farnsworth* v. *Lowery*, 512.

See Intoxicating Liquors, 7, 9; Promissory Note, 4; Railroad, 3; Town, 3.

EXECUTION.

1. If a debtor, owning two cows, is entitled, after the seizure and removal of one of them on an execution against him, to elect which cow shall be exempt from execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 4, he must make such election within a reasonable time; and, if he fails so to elect, the

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officer may make an election for him, and he is bound by such election. *Savage* v. *Davis*, 401.

2. If one of two cows belonging to a debtor is seized upon an execution against him on the morning of one day, and is not removed from his premises until the evening of the next day, a jury would be warranted in finding that he had waived his right to elect which cow should be exempt from execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 4, by not making such election until six days after the removal. *Ib.*

3. A whip, owned and used by a debtor on his farm, is not exempt from seizure on execution, under the Gen. Sts. *c.* 133, § 32, *cl.* 5, in the absence of special circumstances entitling him to hold it as so exempt. *Ib.*

See Estoppel, 2; Recognizance; Release, 1; Scire Facias, 1, 3.

EXECUTOR AND ADMINISTRATOR.

See Amendment, 1; Devise and Legacy, 1; Equity, 5, 9; Estates of Deceased Persons; Husband and Wife, 3; Money Lent; Scire Facias, 1, 3; Trover, 1.

EXPERT.

See Evidence, 10, 11; Intoxicating Liquors, 6.

FACTOR.

See Pledge.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FENCE.

The remedy provided by the Gen. Sts. c. 25, § 4, for enforcing payment of an award of fence-viewers, is applicable only to a case where the duty of maintaining the fence is required by the statute, and does not apply to a case where such duty arises from the acceptance of a deed containing a condition to maintain it. *Kennedy* v. *Owen*, 227.

FIXTURE.

1. A mortgagor of land remained in occupation thereof after the mortgage had been foreclosed, to his knowledge; and, without the consent of the owner, erected a house and barn thereon, which rested on posts sunk into the ground, earth being banked up above the sills of the house, and the space between the barn and the ground being boarded up, the upper boards being nailed to the barn and the posts. The barn projected over other land of the mortgagor, and the entrance to it was from his land. Both house and barn could be removed without doing any great injury to the land. *Held*, that both house and barn became part of the realty; and that the owner of the land could maintain a bill in equity to restrain the mortgagor from removing them. *Guernsey* v. *Wilson*, 482.

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2. A tenant at will of a lessee of land erected a small building on the land resting on stone posts sunk into the ground. The building was erected with the knowledge and consent of the lessor of the land, and with an understanding on his part, and on that of the tenant at will, that it could be removed as a trade fixture. Both tenancies expired at the same time, and neither tenant removed the building; the lessor resumed possession of the land, and soon afterwards the former tenant at will hired it with other land at an increased rent. *Held*, that the tenant at will could not, after this, remove the building, or maintain replevin for it, on the refusal of the owner of the land to allow its removal. *McIver* v. *Estabrook*, 550.

FRAUD.

See EQUITY, 3; EVIDENCE, 8; PARTNERSHIP, 2.

FRAUDS, STATUTE OF.

1. An oral guaranty of the payment of the note of a third person, given in payment of a debt of the guarantor, is within the statute of frauds, even if the principal object of the transaction is the payment of the guarantor's own debt. *Dows* v. *Swett*, 140.

2. If A. and B. make an oral contract, by which A. is to buy land by auction upon the joint account of both in equal shares, the contract is within the Gen. Sts. *c.* 100, § 19; *c.* 105, § 1; and, after the land has been conveyed to A., B. cannot maintain an action for a breach of the contract. *Parsons* v. *Phelan*, 109.

3. A contract in writing signed by the defendant, a manufacturer of sheet-iron, was as follows: "I hereby agree to ship you balance of twelve cars sheet-iron which we owe you on a previous arrangement, same to be agreed upon at prices and terms as below and specification not to exceed one car of heavy sizes heavier than twenty-one gauge and not more than one car of thirty gauge. Balance of specification to be No. 21 to No. 26 gauge, all specifications to be sent us at rate of one car-load per month." Then followed a list of prices for different sizes per one hundred pounds, and terms of payment. *Held*, in an action thereon, in which it appeared that the iron to which the contract related was of greater value than $50, that the contract was for the sale of goods, and not for labor and materials; that oral evidence was inadmissible to show how many cars were meant; that there was no sufficient memorandum in writing, within the Gen. Sts. c. 105, § 5, even as to two car-loads; and that the action could not be maintained. *May* v. *Ward*, 127.

See EXCEPTIONS, 11.

FRAUDULENT REPRESENTATION.

In an action upon a promissory note given to an insurance company in payment of a premium for a policy of insurance, evidence is admissible that the defendant was induced to make the note by the representations of the plaintiff's agent that certain persons named and known to the defendant were to be members of a local board of directors to be organized for the

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management of the plaintiff's affairs; and that such representations were false and fraudulent. *Penn Ins. Co.* v. *Crane*, 56.

See DAMAGES, 3; EVIDENCE, 16, 19; LAW AND FACT, 1; PARTNERSHIP, 2.

FREIGHT.

See CONTRACT, 1.

GAMING.

1. Section 1 of the Gen. Sts. c. 85, so far as it authorizes a third person to recover treble the value of money lost by gaming, is a penal statute; and by the Gen. Sts. c. 155, § 20, an action by such third person is barred, if not brought within one year after the date of the loss. *Cole* v. *Groves*, 471.
2. Under the Gen. Sts. c. 85, §§ 1, 2, the amount of money lost as the net result of continuous gaming at one sitting, of mixed losses and gains or continuous losses, may be declared for in one count as a single loss. *Hogle* v. *Connell*, 150.

GIFT.

In an action by E. against the executor of the will of M., for money had and received, there was evidence tending to show that a deposit was made by a third person in a savings bank, and a deposit-book was taken in the name of "E. or M., or the survivor of them;" that M. drew the money from the bank during the life of E.; and that the amount so drawn out was put in the bank by the depositor as a perfected gift to the uses declared by the terms of the deposit-book, and that M. appropriated the money to her own use. E. admitted that she put no money of her own in the bank, and that she never had any exclusive possession or control of the deposit-book, and had no knowledge of the existence of such deposit until about the time it was withdrawn by M., which was after the death of the depositor. The evidence showed that M. had possession of the deposit-book when she withdrew the money. The judge instructed the jury, "that if they found the money was deposited by some third person in the name and to the use of 'E. or M. or the survivor of them,' and that such gift was completed by a transfer and delivery, and by a surrender of all control on his part over the fund, then the legal effect of such deposit would be the same as if in the name of 'E. and M. and the survivor of them;' and that during their joint lives they would be entitled each to one half the dividends, and upon the decease of either the fund would go to the survivor." *Held*, that the evidence did not establish a trust; that it was for the jury to determine what were the terms of the gift; and that the instruction given was misleading. *Ide* v. *Pierce*, 260.

See HUSBAND AND WIFE, 3.

GOODS SOLD AND DELIVERED.

See ACCEPTANCE, 2; CONTRACT, 5; EVIDENCE, 3, 4, 18; HUSBAND AND WIFE, 1, 2; VARIANCE, 2.

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GRANT.

The proprietors of a town in 1684 laid out two highways through the town, ten rods wide, crossing each other at a right angle. In 1723 they laid out a lot at the intersection of the two highways, describing it as "left for the minister," and as bounded "against" one of them, and as "butting" upon the other. Neither in 1684 nor in 1723 had the proprietors of a town any authority to lay out highways or town ways. From time immemorial the town used a portion of the way laid out in 1684 for a schoolhouse, and up to 1860 maintained a hearse-house upon it, and in 1811 the town voted to give a lot of land within the way to the Commonwealth for a gun-house. *Held*, that by the grant of 1723 the fee to the centre of the ways did not pass, and that the lot was bounded by the external lines of the ways. *Phelps* v. *Webster*, 17.

GUARANTY.

See CONTRACT, 9; FRAUDS, STATUTE OF, 1.

GUARDIAN AND WARD.

See BOND, 2.

HOMICIDE.

See EVIDENCE, 5, 22; EXCEPTIONS, 15.

HORSE RAILROAD.

See NEGLIGENCE, 3.

HOUSE OF ILL FAME.

See INDICTMENT.

HUSBAND AND WIFE.

1. If a husband and wife live apart by mutual consent, the wife receiving a sum not sufficient for her support, and agreeing that she will release her dower in his land, thereafter support herself and make no claim upon him, he is not liable for necessaries furnished to her, she not having, after such arrangement between them, made any claim upon him for support, or offered to return to him. *Alley* v. *Winn*, 77.
2. A declaration for the price of milk delivered to the defendant, at his request, is supported by proof of a delivery to the defendant's wife, while living apart from him, without means of support, by reason of his cruelty. *Benjamin* v. *Dockham*, 418.
3. A husband may make a gift of personal property to his wife, which, if not revoked by him, will, after his death, give her a valid title to the property against his heirs, if, with the intention on his part to give it to her,

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the property is actually delivered to and retained by her, and no rights of the creditors of the husband are impaired. *Marshall* v. *Jaquith*, 136.

See ACTION, 2; DEVISE AND LEGACY, 1, 2, 4; INSOLVENT DEBTOR.

IMPOUNDING OF CATTLE.

The mere driving of cows off a person's land into the highway, and detaining them there until the owner comes and takes them away, and then demanding a sum of money as damages, is not, as matter of law, an impounding of the cows. *Conners* v. *Loker*, 510.

IMPROVEMENTS.

See EXCEPTIONS, 8.

INDICTMENT.

1. A count for maintaining a house of ill fame, under the Pub. Sts. *c.* 101, §§ 6, 7, and a count for maintaining a disorderly house at common law, may be joined in one indictment; and it is not necessary to aver that the different counts are different descriptions of the same act. *Commonwealth* v. *Ismahl*, 201.
2. At the trial of an indictment containing two counts, one, under the Pub. Sts. *c.* 101, §§ 6, 7, for maintaining a house of ill fame, and the other, at common law, for maintaining a disorderly house, both of which relate to the same house and time, and the same acts done in said house, the defendant is not entitled to require the government to elect on which count it will go to the jury, although the evidence discloses but one series of facts or transactions. *Ib.*

See ASSAULT; COMPLAINT; CONSPIRACY; RAILROAD, 1; VARIANCE, 1.

INSANE PERSON.

See BOND, 2.

INSOLVENT DEBTOR.

1. The right to use trade-marks, in connection with a manufacturing business, which are not personal in their character, but designate merely the place or establishment at which the goods are manufactured, passes to the assignee in insolvency of the owner, under the Gen. Sts. *c.* 118, § 44. *Warren* v. *Warren Thread Co.* 247.
2. The holder of a promissory note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another surety and then assigned the note with his claim against the estate to the solvent surety, who paid the holder in full. *Held*, on a bill in equity, that this amounted to payment of the note, and that the Court of Insolvency rightly ordered the proof to be expunged, and the surety to prove only one half of the claim, although he would not receive more than half of what he had paid for the note, if allowed to prove to the full amount. *New Bedford Inst. for Savings* v. *Hathaway*, 69.

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3. The owner of a parcel of land mortgaged it, subsequently conveyed his equity of redemption, and several years afterwards went into insolvency. The mortgagee sold the land under a power of sale contained in his mortgage, without obtaining any order of the insolvency court, and applied the proceeds in part satisfaction of his debt. *Held*, that he was entitled to prove the balance of his claim against the estate of the insolvent; and that the Gen. Sts. *c.* 118, § 27, did not apply. *Wilson* v. *Bryant*, 291.
4. A., owning land subject to a mortgage, conveyed his equity to B., who agreed with A. to assume and pay the mortgage. On the mortgage becoming due, neither A. nor B. paid the same. The mortgagee subsequently indorsed the note secured by the mortgage in blank, without recourse, and delivered it to the wife of A., who paid for it out of her separate estate, and the mortgagee at the same time assigned the mortgage to her. B. afterwards became insolvent. *Held*, that A. could not prove, against B.'s estate in insolvency, a claim for the amount remaining unpaid on the mortgage. *Ib.*
5. An action upon a judgment recovered in this State against a resident thereof, on a debt due to a resident of another State, is not barred by a discharge in insolvency granted here on proceedings begun after the judgment was rendered, if the original debt would not have been discharged. *Murphy* v. *Manning*, 488.

See ACTION, 3.

INSURANCE.

I. *Life and Accident.*

1. Under a policy of insurance against accident, providing that no claim shall be made under it when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger, and containing a condition that the assured is required to use all due diligence for personal safety and protection, no recovery can be had for the death of the assured, which is caused by his being struck by a railroad train, while running along the tracks in front of it in the night-time, for the purpose of getting on a train approaching in an opposite direction on a parallel track. *Tuttle* v. *Travellers' Ins. Co.* 175.

See EVIDENCE, 16; FRAUDULENT REPRESENTATION.

II. *Fire.*

2. The fact that, at the time of making a contract of insurance, by an agent of the insured with an agent of an insurance company, a prior insurance by the same company existed on the same property, which was a material fact, and which was not known to either contracting party, will not avoid the contract, although the contract would not have been made if the existence of such prior insurance had been known at the time. *Bridgewater Iron Co.* v. *Enterprise Ins. Co.* 433.
3. If, at the time of making a verbal application for insurance, the applicant produces a list of the existing insurance on the property sought to be insured, and states his honest belief that it is correct, and the insurance

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company has the means of verifying the statement, but fails to do so, as the list proves to be incorrect, this is not a misrepresentation of fact which will avoid a policy subsequently issued, containing an express warranty that all the facts and circumstances have been truly stated in the application, and a condition that, "if any material fact or circumstance shall not have been fairly represented," the policy shall be null and void. *Bridgewater Iron Co.* v. *Enterprise Ins. Co.* 433.

INTEREST.

See DAMAGES, 1, 3, 4; EVIDENCE, 15; PROMISSORY NOTE, 2.

INTOXICATING LIQUORS.

1. A complaint for selling intoxicating liquors to a minor, without having "any license, authority, or appointment, according to law, to make such sale to said minor," need not allege that the defendant was licensed under the Pub. Sts. *c.* 100. *Commonwealth* v. *O'Brien*, 198.
2. A complaint on the Pub. Sts. *c.* 100, § 12, as amended by the St. of 1882, *c.* 259, § 1, alleged that the defendant, at a time and place named, was duly licensed to sell spirituous and intoxicating liquor in certain premises, to wit, "the room in the first story of the building situate and numbered fourteen in Charter Street in said city," and then and there used by him for the sale of spirituous and intoxicating liquor under the provisions of such license, and that he "did then and there place and maintain upon said premises, so used as aforesaid, a certain screen, blind, shutter, curtain and partition, in such a way as to interfere with a view of the business conducted upon said premises, and with a view of the interior of said premises." *Held*, that the complaint was sufficient. *Commonwealth* v. *Gibbons*, 197.
3. The Pub. Sts. *c.* 100, § 12, as amended by the St. of 1882, *c.* 259, § 1, providing that no licensee shall maintain, or permit to be maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind, shutter or other obstruction, in such a way as to interfere with a view of the business conducted upon the premises, or with a view of the interior of the premises, applies to a licensee who maintains such shutters upon his premises on the Lord's day, although he is prohibited from, and is not in fact, carrying on business on that day. *Commonwealth* v. *Casey*, 194.
4. A complaint for an unlawful sale of intoxicating liquors is sustained by proof of an unlawful sale of lager beer, under the Pub. Sts. *c.* 100, § 27. *Commonwealth* v. *Whelan*, 206.
5. At the trial of a complaint for an unlawful sale of intoxicating liquors, the evidence for the government tended to show a sale by the defendant of lager beer. The defendant testified that, at the time of the alleged sale, he had no intoxicating liquors on his premises; that the only beer he had was Bavarian hop beer; and that he bought all of his beer of a certain brewer; and he produced and identified a label as the label which was on the barrel from which the alleged lager beer was drawn. He then offered

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the label in evidence for the purpose of identifying the barrel and its contents; but it was excluded. *Held*, that it should have been admitted. *Commonwealth* v. *Collier*, 203.

6. At the trial of a complaint for an unlawful sale of intoxicating liquors, a witness testified for the government that he tasted liquor sold by the defendant; that it was lager beer; and that he could tell by the taste alone whether it contained three per cent of alcohol. *Held*, that the defendant was not entitled to ask a witness, an expert in the manufacture and taste of beer, whether a person could determine from the taste alone the proportion of alcohol contained in a given sample of beer. *Ib.*

7. At the trial of a complaint for an unlawful sale of intoxicating liquors, it appeared that the defendant's saloon was fitted up with a bar, beer-pump, glasses and bottles; that on the exterior wall was the sign, "Ale and Lager Beer;" that, at the time of the alleged sale, the defendant had no license to sell intoxicating liquors, but that he had previously had a license. He testified that the interior arrangements of the saloon and the sign on the exterior were the same on the day of the alleged sale as they were when he had his license. He then asked the judge to instruct the jury, that, if they believed that the interior arrangement of the saloon, and the sign on the exterior, were in the same condition and position on the day of the alleged sale as they were in during the time he had his license, "no inference adverse to the defendant can be drawn therefrom." The judge declined to give this instruction. *Held*, that the defendant had no ground of exception. *Ib.*

8. At the trial of a complaint for an unlawful sale of intoxicating liquors, it appeared that the building in which the sale was made was bounded on one side by C. Street and on another side by S. Street, the two streets intersecting each other at the corner of the building; that the only entrance to the building and the only windows of the premises were on C. Street, the entrance being numbered "28 C. Street;" that a former entrance and a former window on S. Street had been permanently closed by boarding up, to meet the requirements of the authorities in granting a license to the defendant; that upon the wall of the building on S. Street there were two signs on which the defendant's name appeared, and upon the same wall a sign on which were the words, "Entrance 28 C. Street;" and that the whole building was within four hundred feet of a building on S. Street, then occupied by a public school. *Held*, that the defendant's building was on S. Street, within the meaning of the St. of 1882, *c.* 220. *Commonwealth* v. *Whelan*, 206.

9. At the trial of a complaint for an unlawful sale of intoxicating liquors, the government contended that the place in which the sale was made was within four hundred feet of a building on the same street, then occupied by a public school. The superintendent of public buildings testified that he had charge of said building, and had repaired the same under appropriations for public schools by the school board of the city; that he had seen schools in session there, but had no further personal knowledge that it was a public school. The superintendent of schools testified that said building was occupied by a certain primary school, and that it was under his charge

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as such superintendent; and that he had no personal knowledge of its establishment as a public school. The clerk of the school board produced a printed manual of all the public schools in the city, which he testified was issued by him under the direction of the school board; and produced from the records of said board the order for its preparation by him, and stated that this was the manual prepared under that order. The manual was then admitted in evidence, by which it appeared that said primary school was a public school, and located in said building. *Held*, that all the evidence was competent, and was sufficient to prove that the building was in fact occupied by a public school, within the St. of 1882, *c.* 220. *Commonwealth* v. *Whelan*, 206.

10. A license to sell intoxicating liquors, granted to a person whose premises are within four hundred feet of a building on the same street occupied by a public school, is void, under the St. of 1882, *c.* 220. *Ib.*

See CERTIORARI; COMPLAINT; EVIDENCE, 9.

JUDGE.

See CONSTITUTIONAL LAW, 1, 2.

JUDGMENT.

See INSOLVENT DEBTOR, 5; RELEASE, 1; SCIRE FACIAS, 2.

JURY.

The fact that, in an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate by being struck by a locomotive engine, the jury took a view of the place where the accident occurred, will not warrant the inference that they acquired knowledge of material facts, which were not put in evidence, and which might have influenced their verdict, especially if the view was taken more than two years after the accident and at a different season of the year; or that they rejected as incorrect, from their own observations, the testimony of a civil engineer, who made measurements of certain distances in the vicinity of the place of the accident. *Tully* v. *Fitchburg Railroad*, 499.

JUSTICE OF THE PEACE.

See RECOGNIZANCE; TRIAL JUSTICE.

LACHES.

See CONTRACT, 9.

LAND DAMAGES.

See DEED, 2; EXCEPTIONS, 12; WATERWORKS, 1, 2.

LANDLORD AND TENANT.

A landlord who lets tenements in a building to different tenants, with a right of way in common over a flight of stone steps, without a railing, leading

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from the street to the yard of the building, is not liable to a tenant injured by falling upon ice accumulated upon the steps, if it is not the landlord's duty to keep the steps clear of ice, although the steps are constructed of such material and in such a way as to occasion the accumulation of ice thereon, there being no change in the construction of the steps since the tenancy began. *Woods* v. *Naumkeag Steam Cotton Co.* 357.

See CONTRACT, 7; TROVER, 4.

LAW AND FACT.

1. If a contract is sought to be avoided on the ground that it was induced by false and fraudulent representations, the question of the materiality of the representations is for the court, and not for the jury. *Penn Ins. Co.* v. *Crane*, 56.

2 At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine, if the evidence is conflicting on the question whether the intestate survived his injuries, it should be submitted to the jury. *Tully* v. *Fitchburg Railroad*, 499.

See CONTRACT, 1; EXCEPTIONS, 4; MORTGAGE, 3; NEGLIGENCE, 2, 3; RAILROAD, 3, 4.

LEASE.

See MORTGAGE, 3.

LICENSE.

See DOG, 1; INTOXICATING LIQUORS, 1–3, 8, 10.

LIEN.

See CONTRACT, 1; EQUITY, 9; PLEDGE; SHIP, 1.

LIMITATIONS, STATUTE OF.

1. The pendency of proceedings in bankruptcy, under the U. S. St. of March 2, 1867, against a debtor, does not suspend the operation of the statute of limitations in his favor. *Doe* v. *Erwin*, 90.

2. An action for money had and received, to recover money paid under a mistake of fact, in which there is no claim of fraudulent concealment, is barred by the statute of limitations, unless brought within six years from the date of the payment of the money; and no demand before bringing the action is necessary. *Sturgis* v. *Preston*, 372.

3. A partnership debt is taken out of the operation of the statute of limitations by a part payment thereof made by one partner within six years, although the firm had then been dissolved by the voluntary act of the partners, if the holder of the debt had no knowledge of the dissolution. *Buxton* v. *Edwards*, 567.

See AMENDMENT; BANKRUPT; BOND, 2; DEVISE AND LEGACY, 1; ESTATES OF DECEASED PERSONS, 1; GAMING, 1; PLEADING, 7; PROMISSORY NOTE, 1; SCIRE FACIAS, 2; WATERWORKS, 3.

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LORD'S DAY.

If a person sails for pleasure in his yacht on the Lord's day, in violation of the Gen. Sts. *c.* 84, § 2, and if, while he is so sailing, his yacht is injured by being negligently run into by a steamboat, his unlawful act necessarily contributes to the injury, and he cannot maintain an action therefor against the owner of the steamboat; but if the act of those in charge of the steamboat, in running against the plaintiff's yacht, was wanton and malicious, he can maintain such action, if they were acting within the general scope of their employment, and were executing their master's business. *Wallace* v. *Merrimack River Nav. Co.* 95.

See EXCEPTIONS, 2; INTOXICATING LIQUORS, 3; MORTGAGE, 2.

MALICIOUS PROSECUTION.

To maintain an action for a malicious arrest, authorized by the certificate of a magistrate issued under the St. of 1877, *c.* 250, § 5, the burden is on the plaintiff to prove that, at the time the defendant procured the arrest, he had no probable cause to believe that the plaintiff intended to leave the State; and it is not enough to prove that the plaintiff did not in fact intend to leave the State. *Legallee* v. *Blaisdell*, 473.

MANSLAUGHTER.

See EVIDENCE, 5.

MARRIED WOMAN.

See HUSBAND AND WIFE; INSOLVENT DEBTOR, 4.

MASTER AND SERVANT.

1. A person employed by a city to superintend the digging of a trench, and a person employed as a laborer to dig the trench by the same master, are, *prima facie*, fellow servants; and, to maintain an action against the city for personal injuries occasioned to the laborer by the negligence of the superintendent, the declaration must allege facts, the legal effect of which is that they are not such fellow servants. *Flynn* v. *Salem*, 351.
2. If a person employed to dig a trench is injured by the caving in of the sides of the trench, his employer is not liable to an action for such injury, if he furnished the materials for sheathing or shoring up the sides of the trench, and the materials were not used for that purpose by the person employed by him to superintend the digging of the trench. *Floyd* v. *Sugden*, 568.

See LORD'S DAY.

MAXIM.

"*Noscitur a sociis.*" See *Schouler, petitioner*, 426, 427.

MECHANIC'S LIEN.

See SHIP, 1.

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MEMORANDUM.

Appointment of Mr. Justice Holmes, 1.

MERGER.

See CORPORATION, 3; EQUITY, 11; INSOLVENT DEBTOR, 5.

MILL.

See AMENDMENT, 2; WATERWORKS, 1, 2.

MISTAKE.

See DEED, 3; LIMITATIONS, STATUTE OF, 2.

MONEY HAD AND RECEIVED.

Money held under an invalid attachment may be recovered of the attaching officer in an action for money had and received. *Allen* v. *Butman*, 347.

See LIMITATIONS, STATUTE OF, 2; PLEADING, 5.

MONEY LENT.

In an action for money lent to the defendant by the plaintiff, it appeared that the defendant had a large sum of money belonging to A., and that A. gave an order to the plaintiff on the defendant, which stated that A. had made arrangements with the plaintiff to settle up his affairs; that the defendant was to have a certain sum and the balance was to be in the plaintiff's name as he should see fit. The plaintiff testified that the defendant paid over to him the money mentioned in the order, and that he lent a portion of it to the defendant. The defendant was afterwards appointed executor of A.'s will. *Held*, that the action could not be maintained. *Whitwell* v. *Winslow*, 343.

MORTGAGE.

I. *Real Property.*

1. The purchaser of land sold under a power contained in a mortgage may maintain an action, on the St. of 1879, *c.* 237, against the mortgagor, to recover possession of the land. *Lowe* v. *Moore*, 259.
2. If the last day of the three years limited by the Gen. Sts. *c.* 140, § 1, for the redemption of land from a mortgage, falls on Sunday, a tender of the amount due on the mortgage upon the following day is too late. *Haley* v. *Young*, 364.

See BOND, 1; CONTRACT, 8; DAMAGES, 1; EQUITY, 3, 11; EVIDENCE, 15; FIXTURE, 1; INSOLVENT DEBTOR, 3, 4; RELEASE, 3; TROVER, 4.

II. *Personal Property.*

3. If the owner of a farm leases it to a person for a year, under an oral agreement, by which the lessee is to "carry on the farm at the halves,"

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and is to leave at the end of the term as much hay as he found there at the beginning, and the lessor does not occupy the farm during the term, it cannot be held, as matter of law, that the lessor has, during the year, such potential interest in the crops as to enable him to mortgage them. *Ogden* v. *Moore*, 48.

4. The word "date" in the St. of 1874, *c.* 111, relating to the recording of mortgages of personal property, is not limited to the date stated in the *testimonium* clause, but refers to the day of the delivery of the deed. *Id.*

See ATTACHMENT; REPLEVIN, 1.

MURDER.

See EVIDENCE, 22; EXCEPTIONS, 15.

NAME.

See EXCEPTIONS, 4.

NEGLIGENCE.

1. If a horse escapes from the control of the owner's agent, through his negligence, and, after running six hundred and fifty feet, enters upon the tracks of a railroad corporation at a point where there are no barriers, and after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover. *Amstein* v. *Gardner*, 4.

2. In an action for personal injuries occasioned to a woman sixty-seven years old, by being knocked down by a horse and wagon, while crossing a street on some flagstones at a point where the street forms a junction with two other streets, all much travelled, in the compact part of a city, the fact that, before attempting to cross and while crossing, she did not look up or down the street but straight ahead, is not conclusive evidence of a want of due care on her part; but the question is rightly submitted to the jury. *Shapleigh* v. *Wyman*, 118.

3. A passenger in a street car, after signalling to the conductor to stop the car, left his seat and stood for a moment, while the car was in motion, on the rear platform, upon which there was an accumulation of snow and ice, rendering the platform slippery, expecting that the car would stop so that he could alight, and omitted to take hold of the rail. The car jolted, and he was thrown off. *Held*, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received, was a question of fact for the jury, and not of law for the court. *Fleck* v. *Union Railway*, 480.

See INSURANCE, 1; LORD'S DAY; MASTER AND SERVANT, 1; RAILROAD, 1, 3–5.

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NEW TRIAL.

At a new trial, granted upon motion of the defendant, in an action for the conversion of goods, on the issue of the value of the goods alone, no other question than their value is open to the defendant. *Pratt* v. *Boston Heel & Leather Co.* 300.

See EXCEPTIONS, 3, 17.

NOTICE.

See ACTION, 7; CONDITION; EASEMENT; POOR DEBTOR, 1; WAY, 2–5.

NUISANCE.

See SURVEYOR OF HIGHWAYS.

OFFICER.

See ESTOPPEL, 2; EXECUTION, 1, 2; MONEY HAD AND RECEIVED; POOR DEBTOR, 2; REPLEVIN, 1.

ORDER.

See ACTION, 4; PLEADING, 2, 3.

PARTNERSHIP.

1. If a member of a copartnership, the articles of which provide that each partner is to give his time to the business of the firm, and is not to engage in any other speculation or business in his own name and on his own account to the detriment of the firm, uses his time, and labor and materials belonging to the firm, in making improvements in machines manufactured and sold by the firm, with the knowledge and without the objection of the other partners, they can claim no interest in letters patent procured by him, at his expense and in his name, for such improvements. *Belcher* v. *Whittemore*, 330.
2. If a person having a claim against a partnership takes in payment a promissory note of the successors of the firm, without knowledge that the old firm had been dissolved, and supposing that the note was that of the old firm, he may maintain an action on the debt, without showing that he was fraudulently induced to take the note. *Buxton* v. *Edwards*, 567.
3. One partner, after the dissolution of a partnership, has authority to adjust a claim upon the firm; and if the partner and the creditor account together, the presumption is that an account stated states the debt of the firm; and this presumption is not rebutted by evidence that the creditor had notice of the dissolution of the partnership. *Ib.*

See ACTION, 5; CONSTITUTIONAL LAW, 3; CONTRACT, 4; EQUITY, 4, 6; EVIDENCE, 17; LIMITATIONS, STATUTE OF, 3.

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PATENT.

See CONTRACT, 4; EQUITY, 8; PARTNERSHIP, 1.

PAYMENT.

A. conveyed land in a city to B. on a condition. While the land was in the possession of B. it was sold for non-payment of taxes, and a deed made to the city. A. then entered for breach of condition. After the two years allowed by law for the redemption of the land from the tax sale had expired, the city sold the land, by private sale, to B., in consideration of the payment by him of the amount of the tax for which it was originally sold, intervening taxes and charges, and gave him a quitclaim deed of the land. *Held*, that, although the deed was invalid, the payment by B. enured to the benefit of A., and extinguished the title acquired by the city, and that A. could maintain a writ of entry against B. to recover possession of the land. *Langley* v. *Chapin*, 82.

See CONTRACT, 2; EQUITY, 11; EVIDENCE, 17; INSOLVENT DEBTOR; LIMITATIONS, STATUTE OF, 3; PARTNERSHIP, 2; SALE, 3.

PENSION.

Under the U. S. Rev. Sts. §§ 4785, 4786, 5485, or the U. S. St. of June 3, 1878, an attorney, who has received the fee therein prescribed for services in procuring a pension, is not entitled to maintain an action, against a person other than the pensioner, for a larger fee, upon an alleged promise of such person to pay him for his services as much as they were reasonably worth, there being no agreement in writing as to the amount to be paid him for his services. *Wolcott* v. *Frissell*, 1.

PERPETUITY.

See DEVISE AND LEGACY, 5.

PLAN.

See DEED, 4.

PLEADING.

I. *Parties to Action.*

1. If B. sells goods to A. by a conditional sale, and afterwards takes possession of them for an alleged breach of condition, and sells them to C., from whose possession they are when taken by A., by a writ of replevin, the joinder of B. as a party defendant is wrongful. *Swett* v. *Boyce*, 381.
2. A. manufactured a machine on the order of B., on the agreement that B. should pay cash for it. C. had ordered the machine of B. When the machine was completed, B. was not able to pay cash, and it was agreed between A., B. and C. that B. should pay A. part cash, and give his promissory notes for the balance, secured by an order from B. on C. for

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goods, accepted by C. This was done, and, on the faith of the order, A. delivered the machine to C. on account of B. *Held*, that there was a good consideration between A. and C., and that A. could maintain an action against C. on the acceptance. *Rogers* v. *Union Stone Co.* 31.

3. B. gave an order on C. in favor of A., as collateral security for promissory notes of B., which order was accepted by C. There was a sufficient consideration as between A. and C. Some of the notes were transferred by A. under an agreement that the order should be held by A. as collateral security for the payment of all the notes. A. then became bankrupt. *Held*, that, on the failure of B. to pay the notes, the assignee in bankruptcy of A. could maintain an action on the order for the benefit of the bankrupt estate, and of the holders of the notes which had been transferred. *Ib.*

4. The purchaser of a *chose in action* from an assignee of a bankrupt estate may maintain an action upon it in the name of the assignee. *Ib.*

See ACTION, 3; AMENDMENT, 1; WATERWORKS, 1, 2.

II. *Declaration.*

5. A count in tort for deceit in the sale of stock may be joined with a count in contract to recover back the price paid. *Teague* v. *Irwin*, 303.

6. A declaration in an action of tort alleged that the defendant converted to his own use "a permanent sign, bearing the name of the plaintiff, placed in an advertising case, said sign being the property of the plaintiff." *Held*, that the plaintiff could recover only the value of the sign, and not the value of the case. *Farnsworth* v. *Lowery*, 512.

See GAMING, 2; HUSBAND AND WIFE, 2; MASTER AND SERVANT, 1; VARIANCE, 1–3.

III. *Answer.*

7. The answer to a declaration under the Gen. Sts. *c.* 85, § 1, in three counts, averred that "the cause of action, the alleged offence mentioned in the plaintiff's declaration, was not committed within one year before the suing out of the plaintiff's writ, wherefore he cannot maintain his said action." *Held*, that, even if the declaration set out more than one cause of action, the statute of limitations, Gen. Sts. *c.* 155, § 20, was properly pleaded. *Cole* v. *Groves*, 471.

See APPEAL, 2; VARIANCE, 2.

PLEDGE.

J., who did business in wool as a broker, as a commission merchant and as a warehouseman, applied to the plaintiff to take a consignment of wool from F., and to make advances thereon. The plaintiff agreed to take the wool, and J. subsequently delivered to him a railroad receipt, in which the wool was stated to have been received of F. and to be consigned to the plaintiff, and also an invoice, signed by F., which stated that the wool was consigned to the plaintiff for sale on account of F. On the arrival of the wool, the plaintiff gave the carrier an order to deliver it to J., and received

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from J. a receipt stating that he received the wool for the plaintiff's account, F. consignment; and the plaintiff paid drafts on the wool to the amount he had agreed to advance, some of the drafts being payable to the order of J. The plaintiff gave J. no authority to sell the wool as a factor or consignee, but entrusted it to him as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for it and to negotiate sales, to be reported to and settled by the plaintiff. While the wool was thus in J.'s possession, J. stated to the defendant, who knew that J. was a warehouseman, broker and merchant, that he owned the wool, and pledged it to him for a valuable consideration. The defendant acted in good faith; and, before lending money upon the wool, J. had the wool put in the warehouse of a third person, who gave a warehouse receipt for it. *Held*, in an action of tort for the conversion of the wool, that J. was not a factor or other agent entrusted with the possession of merchandise for sale, within the Gen. Sts. *c.* 54, § 2, nor a person entrusted with merchandise, and having authority to sell or consign the same, within § 3, nor a consignee or factor having possession of merchandise with authority to sell the same, within § 4; and that the plaintiff was entitled to maintain the action. *Held*, *also*, that the fact that J. and F. were jointly interested in the wool, J. having the right to dispose of it, and that the plaintiff, in ignorance of this fact, placed the wool in J.'s possession, did not affect his right to maintain the action. *Thacher* v. *Moors*, 156.

See CONVERSION; PROMISSORY NOTE, 4; TRUST AND TRUSTEE, 1.

POLICE COURT.

See CERTIORARI.

POND.

See WATERWORKS, 1, 2.

POOR DEBTOR.

1. Under the St. of 1877, *c.* 250, § 1, providing that the notice to be issued by a magistrate, to whom application has been made for a certificate authorizing the arrest of a debtor upon the first charge specified in the Gen. Sts. *c.* 124, § 5, to the debtor to appear and submit himself to an examination touching his estate, may be served on the debtor by "leaving the same at his last and usual place of abode not less than three days before the time fixed for the examination, and one day additional for every twenty-four miles travel," a notice to a debtor to appear on the eighth day of a month at nine o'clock in the morning, left at his abode, a little over a mile from the place of examination, on the fourth day of the month at seven o'clock in the evening, is sufficient. *Stewart* v. *Griswold*, 391.

2. In an action upon a poor debtor's recognizance, entered into under the Gen. Sts. *c.* 124, § 10, oral evidence is inadmissible to show that the debtor's last and usual place of abode is different from that recited in the return of the officer who served the notice upon the debtor to appear for

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examination, issued by a magistrate under the St. of 1877, *c.* 250, § 1. *Stewart* v. *Griswold*, 391.

3. A certificate of a magistrate, under the St. of 1877, *c.* 250, § 1, reciting that "I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset," is sufficient. *Ib.*

POWER.

See DEVISE AND LEGACY, 6; TRUST AND TRUSTEE, 1.

PRESUMPTION.

See PARTNERSHIP, 3; SCIRE FACIAS, 2.

PRINCIPAL AND AGENT.

1. If a person executes a deed of land, and places it in the hands of A. with directions to keep it during the grantor's life and on his death to deliver it to the grantee, A. holds it as agent of the grantor, and not as agent of the grantee, and the grantor may revoke it at any time. *Hale* v. *Joslin*, 310.

2. In an action for the price of a horse alleged to have been purchased by the defendant through an agent, there was evidence that the horse at the time of the alleged sale had been in the possession of the defendant for some days, and a horse of the defendant, which was part of the consideration of the trade, was in the possession of the agent; that on the morning of the alleged sale the horse was severely injured while being driven by the defendant; that the agent before this had bought horses for the defendant; that, on the day of the alleged sale, the defendant wrote a letter to the plaintiff, dating it at an early hour in the morning, in which he objected to the price asked, which letter there was evidence tending to show was in fact written after the horse was injured; and that, two days later, the defendant sent a telegram to the plaintiff, saying that he had disposed of his own horse and could not exchange, when in fact he had given the horse to the alleged agent. *Held*, that this evidence would not warrant a finding that the defendant had authorized the purchase of the horse by the alleged agent. *Shaw* v. *Hall*, 103.

See ACTION, 6; BANK, 1–3; EVIDENCE, 21; INSURANCE, 2; PLEDGE.

PRINCIPAL AND SURETY.

See BOND, 2; CONTRACT, 10–12; CORPORATION, 2; EQUITY, 9, 11; INSOLVENT DEBTOR, 2.

PROBATE COURT.

See COSTS, 1; EQUITY, 5.

PROMISSORY NOTE.

1. An instrument, signed by the maker and witnessed by a third person, stating that the maker had received of S. a horse, for which he promised to pay S. or order a sum named in one month from date, "said horse to

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be and remain the entire and absolute property of the said S. until p. for in full by me," is not a promissory note, and an action upon it ca be maintained which is brought more than six years after its date. S. v. *McCarty*, 245.

2. A promissory note for a certain amount, payable to a person named bearer, "with interest the same as savings banks pay," is not negotiab *Whitwell* v. *Winslow*, 343.

3. If a negotiable promissory note is given, in payment of a premium f a policy of insurance, to an insurance company, which gives to the mak of the note a receipt acknowledging such payment, and agreeing to retur the "payment" if the company does not do a certain act, the maker o the note is not obliged, if the company fails to do the act mentioned, to pay the note, and then seek his remedy on the receipt, but may avail himself of the fact of such failure in defence to an action on the note. *Pea Ins. Co.* v. *Crane*, 56.

4. In an action against the indorser of a promissory note, payable at a certain bank, it appeared that the bank lent the maker of the note a sum less than the face of the note on the pledge of it; that subsequently the maker, while indebted to the bank in that sum, failed, and the bank procured from him a note for the amount of the loan, payable on demand, containing a clause declaring that the note in suit was held as collateral security for it, and that the bank might sell the collateral note on the non-performance of the promise, either at public or private sale; and that the second note was afterwards sold and transferred to the plaintiff, the note in suit, held as collateral security for it, being delivered with it to him. The plaintiff, who was called by the defendant, testified that he paid the full face value of the note thus bought, knew that the note in suit was collateral security for it, and received it as such. It also appeared that the plaintiff afterwards sold the note in suit for its full face value to a person who sought to collect its full amount, and who subsequently retransferred it to the plaintiff. The plaintiff, who now sought to recover only the amount of the loan, asked the judge to instruct the jury that there was no evidence that the bank sold to the plaintiff absolutely the collateral security, or did anything more than to sell to the plaintiff the debt for which it held this security, and the interest of the bank in the collateral security, as such. *Held*, that this instruction should have been given. *Proctor* v. *Whitcomb*, 428.

See ACTION, 4, 5; AMENDMENT, 1; COLLATERAL SECURITY; CORPORATION, 3; DAMAGES, 3; EQUITY, 11; EVIDENCE, 14–17; EXCEPTIONS, 17; FRAUDULENT REPRESENTATION; INSOLVENT DEBTOR, 2; PARTNERSHIP, 2; PLEADING, 2, 3.

RAILROAD.

1. It is no defence to an indictment against a railroad corporation, under the St. of 1874, *c.* 372, § 163, for causing the death of a passenger, that the passenger was not in the exercise of due care. *Commonwealth* v. *Boston & Lowell Railroad*, 211.

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2. Under the Sts. of 1875, *c.* 77, 1876, *c.* 150, 1878, *c.* 191, 1879, *c.* 141, and 1880, *c.* 261, an action may be maintained against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for an injury to property caused by the defective construction of the railroad, under such circumstances that an action could have been maintained had the road been owned by a corporation and not by the Commonwealth, although the defective construction was the act of a former manager. *Amstein* v. *Gardner*, 4.

3. At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, while crossing the railroad on foot, it appeared that the accident occurred in the daytime; that the railroad track was straight for a distance of five hundred feet from the crossing where the intestate was struck, in the direction from which the engine came, and then curved so slightly as to permit an approaching train to be seen for a much greater distance; that it was sixteen feet from certain posts set in a fence, through which the intestate passed in going upon the railroad, to the nearest rail upon which the engine came, and about five feet between the rails; and the only witness who saw the intestate at the time of the accident testified that he was moving quickly. *Held*, that the jury should have been instructed that the evidence would not warrant a finding that the intestate was in the exercise of due care. *Tully* v. *Fitchburg Railroad*, 499.

4. At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, the plaintiff contended that the defendant was negligent in not ringing the bell or sounding the steam-whistle; and that the speed was unreasonable. The only witness upon the first point testified that he did not remember whether or not he heard the bell or whistle. The only evidence as to the rate of speed came from two witnesses. One, who saw the train stop, testified that it stopped forty or fifty yards from the crossing where the intestate was struck. The other witness testified that he noticed that the train, after it had stopped, was about three hundred yards from the place of the accident. *Held*, that there was not sufficient evidence of negligence on the part of the defendant to warrant a verdict against it. *Ib.*

5. At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff's intestate, by being struck by a locomotive engine belonging to the defendant, if the plaintiff fails to sustain the burden of proving negligence on the part of the defendant, no inference can be drawn, adverse to the defendant, from the fact that the engineer and fireman who were in charge of the engine at the time of the accident were in court, and were not called as witnesses by the defendant. *Ib.*

See ACTION, 1; CORPORATION, 2; COSTS, 2; EQUITY, 10; JURY; LAW AND FACT, 2.

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RAPE.

See ASSAULT.

RECEIPT.

See EQUITY, 8; EVIDENCE, 16; TROVER, 2.

RECEIVER.

See EQUITY, 2, 7.

RECOGNIZANCE.

Under the Gen. Sts. *c.* 152, § 7, authorizing a justice of the peace to take the recognizance of a debtor "in any case where it might be taken before the clerk of the court," and § 2, providing that "the recognizance may be taken before the Superior Court in any county in term time, or before the clerk of the court in vacation," a justice of the peace has no authority to take such a recognizance on a day when the Superior Court stands adjourned to another day in the same term; and an execution issued on the recognizance is void. *Brayman* v. *Whitcomb*, 525.

RECORD.

See CORPORATION, 1; DOG, 1; MORTGAGE, 4; RELEASE, 3.

RECOUPMENT.

See EXCEPTIONS, 17.

RELEASE.

1. A parol release of a judgment for money, in consideration of the payment of a less sum, is invalid, although such release is indorsed upon the execution issued in the original action. *Weber* v. *Couch*, 26.
2. It is a good defence to an action for wrongfully taking and detaining the plaintiff's goods, that the defendant restored the goods to the plaintiff, and carried them to a place designated by him and stored them there for him, under an oral agreement that the plaintiff would release the defendant from any claim he had against him for the taking and detention. *Petty* v. *Allen*, 265.
3. A. mortgaged a parcel of land to B., and subsequently mortgaged the same land to C. by a deed which was signed and sealed by B. as well as by A., but B.'s name did not appear in the deed except in the *in testimonium* clause, as "mortgagee named in a mortgage on said premises, for the purpose of discharging said mortgage." This deed was acknowledged by A. but not by B., and was recorded. No reference was made on the margin of the record of the first mortgage to the second. After this B. died, and his administrator assigned the first mortgage to D., who purchased it in

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good faith and for a valuable consideration. C. and D. then foreclosed their mortgages. *Held*, that D. could not maintain a writ of entry against C. to obtain possession of the land. *Allen* v. *Leominster Savings Bank*, 580.

REMOVAL OF ACTION.

1. A bill of interpleader, brought by a citizen of another State against two citizens of this State, cannot be removed, on the petition of one of the defendants, to the Circuit Court of the United States, under the U. S. St. of March 3, 1875, § 2. *New York Ins. Co.* v. *Allen*, 389.
2. Section 639 of the U. S. Rev. Sts. provides that, upon certain conditions, an action commenced in a state court may be removed to the Circuit Court of the United States for the district where the action is pending, "next to be held after the filing of the petition for such removal;" and that "in order to such removal, the petitioner must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him." The bond filed with a petition for the removal of an action contained the condition that the petitioner "shall enter in such Circuit Court, on the first day of its session next after the granting of said petition, a copy of the record." The next session of the Circuit Court for the district, held after the granting of the petition, was the session next held after the filing of the petition. *Held*, that the variation in the form of the bond from the words of the statute was immaterial. *Ellis* v. *Atlantic & Pacific Railroad*, 338.

See APPEAL, 1.

REPLEVIN.

1. The mortgagee of goods attached, while in the possession of the mortgagor, by an invalid attachment, may maintain replevin against the attaching officer. *Allen* v. *Butman*, 347.
2. A., who had possession of chattels under a contract of sale by which they were to become his property on payment for them, assigned his interest in the contract to B., and took a writing from B., which stated that A. was to have the chattels on payment of an amount advanced. A. retained possession of the chattels, and paid B. the amount advanced, but no reassignment of the contract was made. Subsequently the seller of the chattels took possession of them for an alleged breach of the contract of sale. *Held*, that the transactions between A. and B. did not prevent A. from maintaining an action of replevin. *Swett* v. *Boyce*, 381.

See DAMAGES, 2; FIXTURE, 2; PLEADING, 1.

RETURN.

See POOR DEBTOR, 2.

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REVOCATION.

See PRINCIPAL AND AGENT, 1.

RULES OF COURT.

See APPEAL, 2; EXCEPTIONS, 19.

SALE.

1. No delivery of the personal property named in a formal bill of sale is necessary to pass the title, as between the parties. *Philbrook* v. *Eaton*, 398.
2. The description of personal property in a bill of sale, the consideration therein recited, and the fact that the grantor, who retains possession of the property, has again sold it, are evidence upon the question of value, in an action by the grantee for conversion of the property. *Ib.*
3. If goods are sold to A., under an agreement that they shall be paid for by instalments and shall become the property of the purchaser when paid for, a payment made by a third person who has bought the interest of the seller in the contract does not enure to the benefit of A. *Swett* v. *Boyce*, 381.

See CONTRACT, 2; EQUITY, 8; ESTOPPEL, 1; EVIDENCE, 13; PLEADING, 1; REPLEVIN, 2; TROVER, 2.

SAVINGS BANK.

The treasurer of a savings bank, by virtue of his office merely, has no implied authority to transfer to a purchaser a promissory note belonging to the bank. *Holden* v. *Upton*, 177.

See EQUITY, 2; EVIDENCE, 2; EXCEPTIONS, 4; GIFT.

SCHOOL.

See INTOXICATING LIQUORS, 8–10.

SCIRE FACIAS.

1. *Scire facias*, issued by this court, is an appropriate process to obtain execution against the estate of a deceased person in the hands of his executor. for arrears of alimony awarded by a decree of this court to the plaintiff against the testator in his lifetime. *Knapp* v. *Knapp*, 353.
2. The provision of the Gen. Sts. *c.* 155, § 23, that decrees of courts of record "shall be presumed to be paid and satisfied at the expiration of twenty years" after the rendition thereof, does not operate as an absolute bar to a writ of *scire facias* on such a decree; but the presumption may be rebutted by evidence showing that the decree has not in fact been satisfied. *Ib.*

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3. On a writ of *scire facias* against the executor of the estate of a person to recover arrears of alimony, execution does not necessarily issue for the full amount found to be due and unpaid at the time of the death of the testator; but the court has discretion, on the facts proved, to determine for what sum the decree for alimony shall be enforced by an execution against his estate. *Knapp* v. *Knapp*, 353.

SET-OFF.

See Work and Labor.

SEWER.

See Town, 1.

SHIP.

1. The builder of a vessel made an agreement with A., who had worked on the vessel for wages, that, when she was finished, A. should furnish sails, which were to remain A.'s property; and that A. should use her and give the builder a portion of her earnings. A., falsely representing that he owned the hull, made a contract with a sailmaker, under which the sails were furnished, and A. used the vessel under the agreement with the builder. *Held*, that the sailmaker could not maintain a petition, under the Gen. Sts. *c.* 151, §§ 12, 13, to enforce a lien against the vessel. *Bates* v. *Emery*, 186.
2. Under the St. of 36 & 37 Vict. *c.* 85, § 7, a seaman is bound by shipping articles, which describe the contemplated voyages of the vessel as follows: "From Cardiff to Point de Galle, and or any other ports or places, trading in any direction or rotation, calling for orders when required, and not to extend beyond the 60th degree north latitude; and not south of 60 degrees south latitude, until the ship's arrival at a final port of discharge on the continent of Europe and or the United Kingdom at the master's option, the voyage not to exceed three years." *Riley* v. *Henderson*, 171.

See Lord's Day; Trustee Process.

STATUTE.

See Action, 7; Costs, 1; Dog; Evidence, 22; Exceptions, 13; Execution; Fence; Gaming; Intoxicating Liquors, 4, 8; Poor Debtor, 1, 3; Railroad, 1, 2; Recognizance; Ship; Tax, 1, 3; Waterworks; Way, 2–5.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitations, Statute of.

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STATUTES CITED, EXPOUNDED, ETC.

English Statutes.

43 Eliz. c. 4.	Charity	113
1 Geo. III. c. 23, § 1.	Judge	826
7 Will. IV. & 1 Vict. c. 26, § 22	Will	254
32 & 33 Vict. c. 71, § 40	Bankrupt	296
36 & 37 Vict. c. 85, § 7.	Merchant Shipping Act	171

Statutes of the United States.

March 2, 1867, § 21.	Bankrupt	91
March 3, 1875, § 2.	Removal of Action	389
—— —— § 3.	" "	341
June 20, 1878	Pension	1

Revised Statutes of the United States.

§§ 639, 640.	Removal of Action	341
§ 3939.	Postal Service	39
§§ 4768, 4769.	Pension	2
§§ 4785, 4786.	"	1
§§ 5046, 5047.	Bankrupt	37
§ 5057.	"	21
§ 5075.	"	296
§§ 5105, 5106.	"	91
§ 5485.	Pension	1

Provincial Statutes.

1693–4 (5 W. & M.) c. 6, § 3.	Way	19
1709–10 (8 Anne) c. 5.	Drain	478
1753–4 (27 Geo. II.) c. 43.	"	478
1762–3 (3 Geo. III.) c. 27.	"	478

Statutes of the Commonwealth.

1783, c. 46, § 4.	Probate Appeal	251
1786, c. 81, § 7.	Way	374
1796, c. 47.	Drain	479
1817, c. 190, § 44.	Costs	251
1826, c. 81.	Watuppa Reservoir Company	270
1840, c. 80.	Carrier	212
1841, c. 115.	Sewer	479
1844, c. 148, § 2.	Attachment	349
—— c. 154, § 3.	Poor Debtor	392
1849, c. 213, § 1.	Tax	88
1853, c. 414.	Railroad	212
1855, c. 444, § 4.	Poor Debtor	392
1856, c. 239, § 5.	Tax	88
1857, c. 141, § 4.	Poor Debtor	392
1858, c. 82.	Tax	88
—— c. 139, § 1.	Dog	541
1859, c. 225, § 1.	"	541
1861, c. 181.	Practice	202
1862, c. 86, § 1.	Costs	14
—— c. 183, § 7.	Tax	88
1864, c. 299, § 1.	Dog	541
—— —— § 5.	"	539
1865, c. 239.	Railroad	549
—— c. 283.	Tax	419
1867, c. 73.	Haverhill Aqueduct	108

Digitized by Google

1867, c. 130, §§ 1, 5. Dog 537
—— —— § 3. " 539
—— —— §§ 6, 7 " 541
1869, c. 111. Sewer 479
—— c. 190. Tax 432
1870, c. 194. Trustee Process 350
—— c. 224, §§ 39 *& seq.* Corporation 590
1871, c. 41. Dog 539
—— c. 133, §§ 4, 5. Fall River 269
—— —— § 10. " " 268
1872, c. 343. Brookline 438
—— —— § 12. " 439
1874, c. 111. Mortgage 48
—— c. 372, § 44. Railroad 242
—— —— §§ 163, 164 " 213
1875, c. 77, § 1. Troy & Greenfield Railroad 5
—— —— §§ 2, 3, 5. " 6
—— c. 99, § 15. Intoxicating Liquors 199
—— c. 177, § 1. Corporation 590
1876, c. 1, § 1. " 590
—— c. 150, § 6. Troy & Greenfield Railroad 6
1876, c. 203, §§ 14–17. Savings Bank 346
1877, c. 232. Lord's Day 96
—— c. 234. Way 149
—— —— §§ 2, 3. " 374
—— —— § 3. " 484, 507
—— c. 250, § 1. Poor Debtor 391
—— —— § 5. " " 473
1878, c. 191, § 1. Troy & Greenfield Railroad 6
—— c. 266, § 10. Tax 82
—— c. 275. " 419
1879, c. 141, §§ 1, 2. Troy & Greenfield Railroad 6
—— c. 237. Forcible Entry and Detainer 259
1880, c. 18, § 5. Cottage City 67
—— c. 26. New Haven & Northampton Co. 547
—— c. 261, §§ 1, 3. Troy & Greenfield Railroad
1881, c. 302. Corporation 242
1882, c. 220. Intoxicating Liquors 206
—— c. 259, § 1. " " 194, 197

Revised Statutes.

c. 7, § 22. Tax 431
c. 25, § 22. Way 374
c. 27. Sewer 479
c. 39, § 52. Railroad 242
c. 76, § 36. Divorce 355
c. 83, § 47. Costs 250
c. 90, § 90. Costs 251
c. 109, § 21. " 251
c. 120, § 11. Statute of Limitations 373
—— § 24. " " 356

General Statutes.

c. 11, § 25. Tax 431
c. 12, § 22. " 87
—— § 35. " 88
c. 18, §§ 74, 75. Surveyor of Highways 524
c. 25, §§ 2, 3, 11. Fence 229
—— § 4. " 227
—— § 25. Damage by Cattle 511
c. 44, §§ 1, 8. Way 524
—— § 22. " 374
c. 48. Sewer 479
c. 54, § 1. Factor 164
c. 54, §§ 2, 3, 4. Factor 157
c. 57, § 147. Savings Bank 346
c. 63, § 11. Railroad 239
—— §§ 48–62 " 549
—— §§ 97, 98 " 212
c. 68, § 35. Corporation 278
—— § 39. " 279
c. 84, § 2. Lord's Day 95
c. 85, § 1. Gaming 471
—— §§ 1, 2. " 150
—— § 3. " 153
c. 88, § 52. Dog 541

Digitized by Google

c. 89, § 30. Mortgage 581
c. 90, § 25. Tenant at Sufferance 238
c. 92, § 5. Will 589
c. 93, §§ 3, 4. Executor's Bond 117
c. 96, § 6. Estates of Deceased Persons 121
c. 97, § 5. " " 115
—— §§ 5, 16. " " 357
—— § 16. " " 155
—— § 22. " " 13
c. 98, §§ 9, 12. Executor and Administrator 122
c. 100, § 19. Trust 109
c. 101, § 2. Executor and Administrator 122
c. 105, § 1. Statute of Frauds 109, 144
—— § 5. " " 127
c. 107, §§ 45–53. Divorce 354
c. 108, § 10. Husband and Wife 140
c. 113, § 28. Equity 354
c. 117, § 25. Costs. 250
c. 118, §§ 25, 27. Insolvency 294
c. 118, § 44. Insolvency 247
c. 123, § 67. Attachment 347
c. 124, §§ 5, 10. Poor Debtor 391
—— § 8. " " 393
—— § 13. " " 392
c. 129, § 4. Declaration 244
—— §§ 41, 82. Amendment 284
c. 133, § 17. Judgment 117
—— § 32, *cl.* 4, 5. Execution 401
c. 140, §§ 1, 16. Mortgage 366
—— § 30. " 593
c. 142, § 1. Trustee Process 350
—— § 73. Costs 251
c. 145, § 8. Certiorari 313
c. 151, §§ 12, 13. Lien 186
c. 152, §§ 2, 7. Recognizance 525
c. 155, §§ 1, 12. Statute of Limitations 373
—— §§ 4, 7. " " 246
—— § 20. " " 471
—— § 23. " " 353
c. 160, § 34. Carrier 212
c. 161, § 2. Arson 527

PUBLIC STATUTES.

c. 11, § 29. Tax 432
c. 12, §§ 57, 58. " 89
c. 26, § 15. Inquest 223
c. 36, § 27. Damage by Cattle 511
c. 49, § 49. Jury 503
c. 82, §§ 8, 17. Cemeteries 115
c. 99, § 1. Gaming 472
c. 100, § 1. Intoxicating Liquors 199
—— § 12. " " 194, 197
—— § 18. " " 200
—— § 25. " " 199
—— § 27. " " 207
c. 101, §§ 6, 7. Nuisance 201
c. 102, § 86. Dog 540
c. 106, §§ 61 *& seq.* Corporation 590
c. 112, § 56. Railroad 242
c. 116, § 21. Savings Bank 179
—— §§ 24–28. " " 346
c. 120, § 24. Mortgage 581
c. 132, § 14. Executor and Administrator 122
c. 133, § 1. Estates of Deceased Persons 122
c. 136, §§ 1, 9. " " 357
—— § 19. " " 13
c. 146, §§ 33, 37. Divorce 354
—— § 39. " 355
c. 150, § 7. Supreme Judicial Court 340
c. 151, § 29. Equity 354
c. 152, § 10. Appeal 340
c. 153, § 8. Exceptions 189
c. 155, §§ 7, 9. Trial Justice 226
—— § 35. Appeal 377
c. 156, § 35. Costs 249
c. 161, § 79. Attachment 349
c. 162, § 18. Poor Debtor 392
—— § 26. " " 393
c. 165, § 19. Equity 354
c. 167, § 2. Declaration 307
—— §§ 41, 42, 85. Amendment 308
c. 169, § 22. Witness 191
c. 170, § 43. Jury 503

Digitized by Google

c. 183, § 1. Trustee Process 350
——— §§ 16, 17, 53. " 232
c. 186, § 7. Certiorari 313
c. 197, § 4. Statute of Limitations 472
c. 197, § 23. " " 356
c. 198, § 6. Costs. 14
c. 213, § 18. Practice 202
c. 214, § 11. Jury 503
——— § 12. License 210
c. 223, § 5. Statute 540

STOPPAGE IN TRANSITU.

See CARRIER, 2.

STREET RAILWAY.

See NEGLIGENCE, 3.

SUPERIOR COURT.

See AMENDMENT; APPEAL, 3; EXCEPTIONS, 17, 19; RECOGNIZANCE.

SUPREME JUDICIAL COURT.

See APPEAL, 1; COSTS, 1; SCIRE FACIAS, 1.

SURETY.

See PRINCIPAL AND SURETY.

SURVEYOR OF HIGHWAYS.

A surveyor of highways, who enters upon private land and removes an accumulation of ice and snow in a watercourse thereon, which has caused the water to overflow and obstruct the highway, is not liable to an action by the owner of the land for injury done to his lower land by reason of the water overflowing the same and washing away the soil, if the acts of the surveyor were the necessary means for the removal of the nuisance, and he acted with due regard to the safety and protection of the land from needless injury. *Johnson* v. *Dunn*, 522.

TAX.

1. Under the Gen. Sts. *c.* 11, § 25, after a person has seasonably filed a schedule purporting to be a true list of all his property liable to taxation, and has made oath to the same, the assessors have no right to add to such list other property for which they consider him taxable, and assess him thereon, without making any inquiries of him in relation thereto. *Moors* v. *Street Commissioners of Boston*, 431.
2. A sale of land for non-payment of taxes, if valid, creates a title paramount to any existing estate therein; and such title becomes absolute by the lapse of two years. *Langley* v. *Chapin*, 82.

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3. If a city has taken a deed of land sold for taxes, under the St. of 1862, c. 183, it cannot, after the expiration of two years, under the St. of 1878, c. 266, § 10, sell the land to a person not entitled to redeem, except by public auction. *Langley* v. *Chapin*, 82.

See CONSTITUTIONAL LAW, 3; PAYMENT.

TENANT AT WILL.

See FIXTURE, 2.

TENANT IN COMMON.

See MORTGAGE, 3.

TENDER.

See MORTGAGE, 2.

TIME.

See MORTGAGE, 2, 4; POOR DEBTOR, 1; WATERWORKS, 3.

TOWN.

1. A town has no authority by statute, in this Commonwealth, to lay out and construct drains or sewers. *Lemon* v. *Newton*, 476.
2. A town is not responsible for damages resulting from work done under the supposed authority of illegal and void votes. *Ib.*
3. In an action by A. against a town to recover a sum voted by the town to him as compensation for injuries received by him while in the employ of the town, the plaintiff put in evidence the records of the town, from which it appeared that, at a regular town meeting, under an article in the warrant to see if the town will grant aid to A. for injuries received while in the employ of the town, the matter was referred to the selectmen to inquire into the facts and report to the town what they consider would be a fair compensation to A. for his injuries, in addition to what he has already received from the town; that, at a subsequent town meeting, the selectmen reported the facts of the plaintiff's injuries, and that "the town would do well" to pay him a sum named by them; and that, when the report came up for consideration, it was amended by inserting a larger sum instead of that named, and, as amended, it was adopted. The judge instructed the jury, among other things, that the validity of the town's action depended upon whether the money was voted as a gratuity, or was voted as a settlement of a claim against the town, which had been made, or might reasonably be expected to be made, founded upon an alleged legal liability; that if there was no legal liability, but the plaintiff made a claim under such circumstances as to indicate that it was not a mere pretence, but was a real claim founded upon an alleged legal liability, and that claim was made known to the committee, and their report was made in reference to it, the vote was

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valid; that if the town was legally liable, and no claim was made of any legal liability, and upon the facts of the case no such claim could reasonably be expected to be made, and the plaintiff asked aid because he was poor and deserving of favor, the money was voted as a gratuity, and the town was not liable. *Held*, that the vote of the town was so far equivocal that parol evidence was admissible in its interpretation. *Held, also*, that the plaintiff had no ground of exception to the instructions given. *Matthews* v. *Westborough*, 555.

See APPEAL, 3; EVIDENCE, 7; GRANT; WAY.

TRADE-MARK.

See INSOLVENT DEBTOR, 1.

TRIAL JUSTICE.

Since, by the Pub. Sts. *c.* 155, § 7, no one but a justice of the peace can be a trial justice, and, by § 9, a justice of the peace duly appointed trial justice ceases to be such if his commission as justice of the peace expires before his commission as trial justice, a signature to the jurat annexed to a complaint, and to a warrant, as trial justice, involves a signature as justice of the peace, and no separate designation of the inferior office is necessary. *Commonwealth* v. *Mosher*, 226.

TROVER.

1. An administrator, upon proof of the execution of a formal bill of sale of personal property to his intestate, acknowledging receipt of the consideration therein named, and proof of a subsequent sale of the same property by the grantor, is *prima facie* entitled, in an action for conversion against the latter, to recover the value of the property at the time of the subsequent sale. *Philbrook* v. *Eaton*, 398.
2. If the grantor in a bill of sale of personal property, acknowledging receipt of the consideration therein named, retains possession of the property and again sells it, the second sale, and not a refusal to deliver the property to the first purchaser upon a subsequent demand, constitutes a conversion. *Ib.*
3. Evidence that a person, claiming title in a case, wrongfully removed from the case certain glass plates, and left them with the person in whose custody the case had been, and took the case away, is not sufficient to maintain an action for the conversion of the plates, even if the owner of them was ignorant that they were left with such person. *Farnsworth* v. *Lowery*, 512.
4. After an entry by a mortgagee of a farm to foreclose his mortgage, an arrangement was made between the mortgagee and mortgagor by which the latter was to carry on the farm. Subsequently, A., who had purchased the equity of redemption of the mortgagor, by deed duly recorded, took possession of the farm and carried it on, employing the mortgagor as his agent. A. then, after the crops were sown, borrowed money of the plaintiff, under a promise to pay it back from the first crops raised on the farm.

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The mortgagee, after this, was informed for the first time that A. was carrying on the farm, and of the agreement A. had made with the plaintiff, and he objected to A.'s paying the plaintiff from the crops. After the crops were gathered, they were allowed to remain in the possession of A., who delivered to the plaintiff a part of the crops to pay the debt due the plaintiff, and who informed the plaintiff, at the time of such delivery, of the mortgagee's claim. The mortgagee subsequently took possession of the crops, including that portion of them delivered to the plaintiff. *Held*, that, even if the arrangement between the mortgagee, after entry, and the mortgagor constituted the latter a tenant at will, there was no evidence that such a relation existed between the mortgagee and A.; and that an action of tort in the nature of trover would not lie against the mortgagee. *Porter* v. *Hubbard*, 233.

See ACTION, 8; CARRIER, 1; CONVERSION; DAMAGES, 2; NEW TRIAL; PLEADING, 6; PLEDGE; SALE, 2.

TRUST AND TRUSTEE.

1. A power in a trustee to sell trust property, and change investments, gives him no authority to pledge the property. *Loring* v. *Brodie*, 453.
2. Shares of stock in several corporations were transferred to A. to hold in trust for B., a woman, the certificates being in the name of A. personally. A. used the shares as his own, and sold all of them, and, for the purpose of protecting the trust, subsequently purchased other shares to the same amount in the same corporations. While he held the latter shares, B. asked him for the names of her stocks, and A. gave her a list. After a libel for divorce was filed against A., he sold some of the shares, and a few days after purchased the same number in the same corporation. Subsequently, A. transferred all the shares to C., with the undisclosed intent of protecting the trust. *Held*, on a bill in equity by the wife of A., against A., B. and C., to reach and apply these shares in satisfaction of an execution for alimony which she had obtained against A., that these facts would warrant a finding that the shares in the hands of C. were impressed with a trust in favor of B.; and that the bill could not be maintained. *Perkins* v. *Perkins*, 441.
3. An indenture of trust, executed in this State, gave the trustee power to manage and improve the trust estate, and receive the income and profits from time to time, and also to sell or exchange the whole or any part of the trust estate, and the proceeds to invest in any other real or personal estate. The trustee applied to a bank here for an advance on cotton to be shipped from a distant State, proposing to forward to the bank drafts on the consignee of the cotton, and, to further protect the bank, offered to pledge personal securities belonging to the trust estate. He also falsely represented that the cotton was grown on plantations belonging to the trust. The bank, without further inquiry, accepted the proposal, and took the securities, knowing that they formed part of the trust estate. *Held*, that the bank was liable for the value of the securities to the trust estate. *Loring* v. *Brodie*, 453.

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4. Personal property was conveyed by an indenture, in trust to pay from the "net income" an annuity to the sister of the grantor "during her life;" to pay from the "net income" an annuity to a charitable corporation "during the continuance of this trust;" "after the payment of said sums," to invest the remainder of the income, "to be accounted for as an accumulation of the capital fund," until certain grandchildren of the grantor became of age, and then to pay them certain specified sums; after payment of these sums, then "after paying out of the income the said annuities," to divide the remaining income among the four children of the grantor, until a certain grandson should arrive at the age of twenty-five years, and one or more of the grantor's children should die; on said grandson arriving at the age of twenty-five years, "and after payment of all the said sums specifically directed to be paid," to pay "one fourth part of the remaining accumulated principal and income" on the death of any child to such person as he should by will appoint, or, in default of appointment, to his issue, "it being the intention of the grantor that each child shall have and receive its equal share of the income of the whole fund after the period" when the said grandson should have attained to the age of twenty-five years, and that, after his death, "his equal portion of the principal and any accumulated income" should be subject to his disposal by will, or should go to his issue. *Held*, that the trust in favor of the charitable corporation continued after the arrival of the grandson at the age of twenty-five years, and until the death of the sister of the grantor and the decease of all of the grantor's children. *Dexter* v. *Episcopal City Mission*, 394.

5. A testator by his will authorized a person named to withdraw the contents of the testator's bank-book from a certain bank after his death, "said money to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." *Held*, that the nominee was not to take the money for his own use; that the will created a valid trust "for charitable purposes, masses or other charitable uses;" and that, the nominee having died without qualifying as trustee, the court might appoint a successor, who should administer the trust according to the directions of the will. *Schouler, petitioner*, 426.

6. A testator bequeathed a residuary fund to trustees, in trust "to hold the said property as they may receive the same, or at their discretion to sell the same or any part or parts thereof," and to invest the proceeds of such sales according to their best judgment, and, whenever they might deem it expedient, to sell any substituted property at any time held on the trusts, and to invest the proceeds according to their best judgment, with power to convert real estate into personal estate and personal estate into real estate, and to prefer a lower interest and gain to a larger one which might involve risk of loss, and, subject to the payment of certain annuities out of the income, "to pay all the remaining net rents and income during the continuance of this trust" to such of four persons, the testator's wife and three children, as might be living at the time of payment, and to the lawful issue of any then deceased child, such issue taking by representation. Twenty years after the death of the survivor of said four persons, the trust

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property was to be conveyed to the testator's issue then living, the by representation according to the stocks. At the testator's death bonds which were worth more than par, and which have since fall Since his death, the trustees had bought other bonds, some at slightly above par and some at par and accrued interest. *Held*, as the life tenants and the remaindermen, that the former were entitle the net interest on the bonds received from the testator or bought trustees when worth more than par; and that the amount paid for interest on the bonds bought should be retained from the interest quently received. *Hemenway* v. *Hemenway*, 446.

See BANK; COLLATERAL SECURITY; DAMAGES, 4; GIFT.

TRUSTEE PROCESS.

The wages of a seaman on a coasting voyage on the Atlantic coast are not to attachment by the trustee process. *White* v. *Dunn*, 271.

See ATTACHMENT; EXCEPTIONS, 4.

USAGE.

See EVIDENCE, 3; WORK AND LABOR.

VARIANCE.

1. If a declaration alleges that the defendant agreed to bid for a parcel of land at a sale by auction, and buy one undivided half of the land in behalf of, and as agent for, the plaintiff, and the evidence is that the defendant agreed with the plaintiff to buy the land on their joint account, there is no variance. *Parsons* v. *Phelan*, 109.
2. If, in an action for goods sold and delivered, the declaration alleges that the defendant owes a certain sum, and the plaintiff's evidence shows that the goods were sold on credit, which had not expired at the date of the writ, the defendant may rightly ask the judge to rule that the action cannot be maintained, on the ground of a variance between the declaration and the proof, although the answer contains a general denial only. *White* v. *Colby*, 377.
3. A declaration alleged that the parties made a contract, whereby the plaintiff agreed to manufacture roller-skates for the defendant, for an indefinite time, to the extent of the facilities which the plaintiff then had to manufacture them at his factory; that, for that purpose, the defendant ordered the plaintiff to procure and keep on hand for the defendant at all times during the continuance of the contract, at least two weeks' supply of stock and parts of skates, so that the plaintiff might be able to keep his said factory running at its full capacity at all times; that, pursuant to said contract, the plaintiff entered upon the manufacture of skates, and, in accordance with said order, procured and kept at all times, during said contract, at his factory, for the purpose of manufacturing skates for the defendant, a large quantity of stock and parts of roller-skates; that, on a day named

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while the plaintiff was manufacturing skates under this contract, and had on hand two weeks' supply of stock and parts of skates, the defendant ordered him to desist from the manufacture of skates and to manufacture no more for him; that the value of the stock and parts of skates on hand was a sum stated; that the defendant directed him not to use said stock and parts of skates in the manufacture of roller-skates, and that he had no right to use the same for any purpose; that the plaintiff asked the defendant to take said stock and parts of skates and pay him therefor, which the defendant refused to do; and that the plaintiff had the same, but they were of no use or value to him, whereby he had sustained damage in a sum named. At the trial, the evidence tended to show that the plaintiff agreed to manufacture at his factory for the defendant, until further notice, as many skates as his facilities there would enable him to manufacture; that the defendant agreed to take all the skates so manufactured until further notice, and to pay the plaintiff an agreed price therefor; that the plaintiff entered upon the manufacture of skates under this contract, and, while so engaged, the defendant requested him to keep on hand always at least two weeks' supply of stock, that he might manufacture skates faster; that the plaintiff complied with this request; that afterwards, while the plaintiff was engaged in manufacturing skates, the defendant, without any warning, gave him notice to immediately discontinue manufacturing skates, and forbade him to manufacture into skates the stock on hand, and refused to take and pay for said stock; and that the plaintiff could not manufacture into skates said stock without the defendant's permission, because the manufacture of the skates was protected by letters-patent owned by him, whereby the stock on hand, being of great value, became of little or no value to the plaintiff. *Held*, that the evidence did not support the declaration. *Winslow* v. *Plimpton*, 44.

4. An indictment under the Gen. Sts. *c.* 161, § 2, which prescribes a penalty for wilfully and maliciously burning in the night-time the manufactory of another, "being, with the property therein contained, of the value of one thousand dollars," alleged that the defendant, at a time and place named, in the night-time, "feloniously, wilfully and maliciously did burn a certain manufactory, used for the manufacture of fishpoles, the same being, with the property therein contained, of the value of one thousand dollars, of the property of one P." It appeared at the trial that the building burned was the property of P., and was of the value of four hundred dollars; that the personal property contained in the building belonged to one B., excepting property of a small amount in value, which belonged to the defendant; and that the property belonging to B. was of the value of one thousand dollars. *Held*, that there was not a fatal variance between the allegations and the proof. *Commonwealth* v. *Brailey*, 527.

See EXCEPTIONS, 10; HUSBAND AND WIFE, 2; WAY, 4.

VERDICT.

If one count of an indictment charges a conspiracy to commit the crime of extortion by falsely accusing one of the crime of adultery, and another

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count charges a conspiracy falsely to accuse one of the crime of adu
there is evidence to sustain the former count, a general verdict o
will not be set aside, although the latter count is insufficient. Co
wealth v. *Nichols*, 531.

See EXCEPTIONS, 17; JURY.

VOTE.

See EQUITY, 4; TOWN, 3.

WAIVER.

See EXECUTION, 2.

WAREHOUSEMAN.

See CONVERSION; PLEDGE.

WARRANTY.

See EXCEPTIONS, 11; INSURANCE, 3.

WATER.

See COSTS, 2; WATERWORKS.

WATERWORKS.

1. The St. of 1871, *c.* 133, authorized a city to take the waters of a gre
pond for the purpose of supplying its inhabitants with pure water; an
provided that the city should be liable to pay all damages that should be
sustained by any person in his property by the taking of said waters, or by
the taking of any land or water rights. Under the authority of this stat-
ute, the city passed an order taking a certain quantity per day of the wate
of the pond. *Held*, that an owner of a mill privilege on a river half a mile
long, which was the outlet of the pond, could maintain a petition, under
the statute, for an assessment of the damages to his privilege by the taking
by the city of the waters of the pond. *Watuppa Reservoir* v. *Fall River*,
267.
2. The St. of 1871, *c.* 133, authorized a city to take the waters of a great
pond for the purpose of supplying its inhabitants with pure water; and
provided that the city should be liable to pay all damages that should be
sustained by any person in his property by the taking of said waters, or by
the taking of any land or water rights. Under the authority of this statute,
the city passed an order taking a certain quantity per day of the waters
of the pond. A company had been previously incorporated "for the pur-
pose of constructing a reservoir of water in" the pond, "for the benefit of
the manufacturing establishments on" a river which was the outlet of the
pond; and it had power to build a dam so as to raise the water in the pond
to a certain height. Its capital stock had always been owned, and it had

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been managed, by the mill-owners on the river, each of whom owned the privilege attached to his mill. *Held*, that the corporation could maintain a petition for any damage to its dam or other property caused by the taking by the city of the waters of the pond; and that each mill-owner was the proper party to bring a petition for damages to his privilege by such taking. *Held, also*, that the city was liable for depriving the petitioners of water used for other purposes, as well as for power. *Held, also*, that a corporation, whose lands did not border on the stream, but to whose mill water was conveyed by a canal running through the land of a riparian owner, under a deed giving the right to the flow of water from the stream, had the same rights against the city as the riparian owners. *Watuppa Reservoir* v. *Fall River*, 267.

3. The St. of 1872, *c.* 343, gave a town the right to take the waters of a river, and provided that any person, sustaining damage in his property by the taking of lands and water rights, or by the construction of any aqueducts or other works for the purposes of the act, might apply by petition for the assessment of his damages at any time within three years from the taking of said property or construction of said works, and not afterwards; and that no application should be made for such assessment of damages until the water was actually withdrawn or diverted by the town under the authority of the act. *Held*, that a petition, filed more than three years after a withdrawal of the water, by direction of the engineer of the town, acting under authority of the water commissioners, for the purpose of testing the engine, but less than three years before an actual distribution of water to the inhabitants of the town, was filed too late. *Tileston* v. *Brookline*, 438.

See AMENDMENT, 2.

WAY.

1. If between the sidewalk of a street in a city and that portion of the street wrought for a carriage-way there is a grassed space, over which a footpath has been worn by use by persons having occasion to enter another street abutting on this street, but not crossing it, or to come in the opposite direction, the city is liable to a person injured by a defect in such path, if the path was known to and recognized by the city as a part of the wrought line of travel, in the absence of any path or other provision made by the city for crossing the street at or near the locality in question, or of any barrier or other warning to indicate that the path as actually used was unsafe or unsuitable. *Aston* v. *Newton*, 507.

2. A notice to a city stated that a person had been injured in the evening of a day named, while passing along a certain street, and opposite or nearly opposite the house of a person named; and that the cause of the injury was "a water-box within the limits of the highway, and from a foot to eighteen inches from the outside edge towards the centre of the sidewalk on the southerly side of said street, against which the undersigned tripped." *Held*, in an action against the city for the injury, that the notice was sufficient in form, under the St. of 1877, *c.* 234, § 3. *Ib.*

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3. A notice to a city stated that a person had been injured by reason of a defective sidewalk, "while walking on the right-hand side of C. Avenue" in that city, "and coming towards the crossing of the F. Railroad;" that the defect was "a depression in the sidewalk caused by the sinking of the earth placed over a large plank gutter;" and that it "was located about one third of the way from the said railroad crossing to Walnut Street in said" city. It appeared in evidence, at the trial of an action against the city for such injury, that there was only one sidewalk on C. Avenue, and that was on the right-hand side going from said city towards the railroad crossing; that the defect was caused by the rotting out of a large plank gutter; and that there was no street in the vicinity of the accident of the name of "Walnut," but that there was a street called "Walden," which entered C. Avenue near by. *Held*, that the notice was sufficient, under the St. of 1877, *c.* 234, § 3. *McCabe* v. *Cambridge*, 484.

4. A notice to a city, under the St. of 1877, *c.* 234, that a person has been injured, at a time and place named, by "an iron grating, in said sidewalk, at said place, which was defective and out of repair, and projected above the level of said sidewalk two inches or more, over the projecting part of which the plaintiff tripped and fell," is not sustained by proof that the plaintiff slipped upon a piece of smooth ice, and did not touch the grating until he lost his balance and fell upon it. *McDougall* v. *Boston*, 149.

5. A notice to a city, under the St. of 1877, *c.* 234, § 3, that a person has been injured by a defect in a highway, if delivered, in the city clerk's office, to the assistant clerk in the absence of the clerk, is duly served on the city. *McCabe* v. *Cambridge*, 484.

See ACTION, 7; DEED, 2; EASEMENT; EXCEPTIONS, 12; GRANT; SURVEYOR OF HIGHWAYS.

WILL.

If a will, which was duly executed, and which contained a clause expressly revoking former wills, is cancelled, it is a question of intention, to be collected from all the circumstances of the case, whether an earlier will, which has not been destroyed, is revived by such cancellation; and, in the absence of affirmative evidence that the testator intended to revive the earlier will by the cancellation of the second, the earlier will will be held not to be revived. *Pickens* v. *Davis*, 252.

See EVIDENCE, 12.

WITNESS.

1. At the trial of an action for deceit in the sale of the stock of a corporation, the defendant called as a witness the treasurer of the corporation, who produced his cash-book, and testified that he showed it to the plaintiff before he bought his stock of the defendant. *Held*, that it was competent for the plaintiff to cross-examine the witness as to the manner of keeping this book, and to show that it was not fairly kept, and did not

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contain a correct statement of the affairs of the corporation. *Teague* v. *Irwin*, 303.

2. On an indictment against A. and B. for fraudulently concealing leased personal property, there was evidence that A. took a mortgage upon the property from the lessee, in the name of C., and assigned the mortgage to B., who took possession of the property and concealed it. The government contended that the transaction between A. and B. was merely colorable; and called C. as a witness, who testified that A. had no written authority to assign the mortgage, but had verbal authority. *Held*, that the government could, under the Pub. Sts. *c.* 169, § 22, contradict the witness by showing that he had made inconsistent statements. *Commonwealth* v. *Thyng*, 191.

3. Merely asking a witness, whom it is sought to contradict, on reëxamination, whether he has made a certain statement to a particular person, with no attempt to designate the time or place, and no suggestion of any reason for not specifying them, or of circumstances which rendered them unnecessary, is not mentioning "the circumstances of the supposed statement sufficient to designate the particular occasion," within the Pub. Sts. *c.* 169, § 22. *Ib.*

See RAILROAD, 5.

WORDS.

"Date." See *Orcutt* v. *Moore*, 48, 52.

"Kept." See *Commonwealth* v. *Palmer*, 537, 542.

"Masses." See *Schouler, petitioner*, 426, 427.

"Vacation." See *Brayman* v. *Whitcomb*, 525, 526.

WORK AND LABOR.

At the trial of an action brought for the benefit of an assignee of the amount due and to become due the plaintiff for wages as a laborer in the employ of the defendant, a corporation, there was evidence that the defendant "had tenement houses to rent to its operatives, and also kept a store from which it sold goods to its operatives and others;" that "when pay-days came, the defendant deducted from the amount of wages the plaintiff had earned during each month certain sums due it for rent of the defendant's tenement occupied by the plaintiff, and for goods sold to the plaintiff from the defendant's store," and paid the remainder to the assignee, who received it under a protest that he was entitled to the whole of the wages; and that "the retention of rent and store bills by the defendant from the wages of its operatives was the custom of the defendant's business for a long time," of which custom the assignee had notice before the assignment. *Held*, that this was not evidence that it was a part of the contract of employment that the plaintiff should be paid, either in whole or in part, for his labor in rent or goods; and that, after notice of the

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assignment, the defendant could not set off against the assignee's claim demands against the plaintiff not arising from the contract of employment. *St. Andrew* v. *Manchaug Manuf. Co.* 42.

WRIT.

See AMENDMENT, 1.

WRIT OF ENTRY.

See EXCEPTIONS, 8, 9; PAYMENT.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. CXXXII.

Page 107, 3d line from top, for "singing" read "signing."
Page 125, top line, for "declaration" read "answer."
Page 181, 2d line from bottom, for "Wilkinson" read "Rockwell."

VOL. CXXXIII.

Page iii, 15th line from top, for "1883" read "1882."
Page 274, 19th line from top, for "either" read "neither."
Page 274, 20th line from top, for "or" read "nor."

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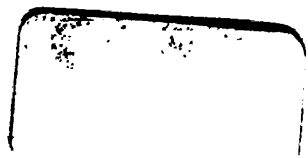

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